United States Court of Appeals

for the Second Circuit

APPENDIX

76-7578

B

In The

United States Court of Appeals

For The Second Circuit

EDWARD BRUCKER and DANIEL R. KAPLAN, as Trustees under the Trust Agreement dated November 15, 1968, made by WILTRUD E. GADBOYS, as Grantor, CECIL G. HUSKEY, E.T. STRATTON and NORTE & CO., a partnership composed of JOSEPH C. GALDI and RITA D. GALDI,

Plaintiffs-Appellees,

vs.

THYSSEN-BORNEMISZA EUROPE N.V., THYSSEN-BORNEMISZA, INC., THYSSEN-BORNEMISZA

(Continued on Reverse)

On Appeal from the United States District Court for the Southern District of New York.

UNITED STATES COURT OF APPEALS
FILED
JAN 20 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPENDIX FOR APPELLANTS

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(10334) LUTZ APPELLATE PRINTERS, INC.
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South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (201) 783-7288

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Defendants-Appellees.

WILLIAM B. WEINBERGER,

Plaintiff-Appellee,

vs.

RICHARD J. POWERS, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALLISTER, JOHN E. O'SULLIVAN, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, JAMES G. FERGUSON, THYSSEN-BORNEMISZA, INC. and INDIAN HEAD INC.,

Defendants-Appellees.

SHAMROCK CORPORATION, individually, and on behalf of all holders of Common Stock and Warrants of Indian Head Inc., similarly situated,

Plaintiffs-Appellees,

vs.

INDIAN HEAD INC.; THYSSEN-BORNEMISZA GROUP N.V.; THYSSEN-BORNEMISZA, INC.; WHITE, WELD & CO. INCORPORATED; RICHARD J. POWERS; JAMES E. ROBISON; HERBERT E. BACHRACH; GERALD B. HUISKAMP; L. EMERY KATZENBACH; MARSHALL F. SMITH; H.H. THYSSEN-BORNEMISZA; R.L. GENILLARD; THYSSEN-BORNEMISZA HOLDINGS, INC. and CHEMICAL BANK,

Defendants-Appellees.

APPEAL OF MORTON P. ROME AND MARJORIE T. ROME, TRUSTEES UNDER TRUST AGREEMENT MADE NOVEMBER 22, 1954, FOR THE BENEFIT OF SALLY P. ROME,

Objectors-Appellants.

PAGINATION AS IN ORIGINAL COPY

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January 18, 1977

A. Daniel Fusaro, Esquire
Clerk, United States Court of Appeals
United States Courthouse
Foley Square
New York, New York

Re: Edward Brucker, et al., Plaintiffs v. Thyssen-Bornemisza Europe N.V. et al., Defendants
Docket No. 76-7578

Dear Mr. Fusaro:

In connection with the annexed Appendix, Lutz Appellate Printers, Inc. has advised that it is unable to reproduce on a clearer basis the following pages of the Appendix, because the original documents from which said reproduction was made are of such quality that no clearer reproduction can be effected: 103a, 114a, 115a, 201a, 202a, 203a, 204a, 205a and 206a.

In the event that the Court of Appeals should desire the reprinting thereof, we shall be glad on notice to have the same printed by a typographic process.

Respectfully yours,

EDWIN P. ROME
EPR:cp
Enclosures
CC: Messrs. Klein, Cutler, Blanc, Weinstein, Sklaver, Rosenman and Hecker.

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is engaging in hyperbole and rhetoric that I am sure he does not intend.

THE COURT: I didn't get any intention of lack of bona fides on anybody's part by anything that has happened thus far, and I am sure we don't have to spend any more time on that.

MR. ROME: Thank you, your Honor.

THE COURT: We are going to get into a leapfrog problem if we don't have your papers before the next hearing. And I would suggest, Mr. Rome, from what I have seen, a very brief study of the papers in answer to your papers, that they haven't said much that they haven't previously said, if anything.

I am suggesting, Mr. Rome, that the papers which you say you just received today, which I received yesterday, are not going to be difficult for you to respond to because I don't think they contain much that is new.

MR. ROME: In light of your Honor's feeling that they are not really to be accorded that much weight, I am ahppy to rest on that which we have already submitted.

THE COURT: I am suggesting that it should be possible for you to do it the best you can. If you can't get the papers to us until Monday morning, at the hearing, when none of us have had a chance to read your

response, perhaps will not be as disadvantageous as it would seem to be.

MR. ROME: If we can't do it by Friday, we won't submit it at all, your Honor.

THE COURT: All right, gentlemen.

Make it 10:30 Monday morning in this courtroom.

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Eugene L. Lewis

Official Court Reporter
U. S. District Court

U.S. DISTRICT COURT FILED NOV 17 1978 S.D. OF N.Y.

TRANSCRIPT OF RECORD OF PROCEEDINGS OF
OCTOBER 18, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER, :

DANIEL R. KAPLAN, Etc., : 74 Civ 5755
75 Civ 1736

Plaintiffs, : 75 Civ 229

vs. :

THYSSEN-BORNEMISZA GROUP N.V. et al., :

Defendants. :

October 18, 1976
10:40 p.m.

BEFORE:

HONORABLE CHARLES E. STEWART, JR.,

District Judge

APPEARANCES:

AUSTRIAN, LANCE & STEWART, Esqs.,
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76-7576

JKLK 2

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Attorneys for Objector
BLANK, ROME, KLAUS & COMINSKY, Esqs.
BY: MORTON P. ROME, Esq., of counsel.

ALSO PRESENT:

MS. SHARON KALIN
MR. MORRIS SHULDENREIN

- - -

THE COURT: Good morning. I have a few points I would like to raise,but before we get into my points, is there anybody who would like to say anything?

MR. BLANC: I had a couple of brief points I would make in response to the reply brief that was filed on Friday as to the objectors.

The objectors seem to be confusing what is planned to be done here, and what might be done in other circumstances by referring to Section 12.02 of the indenture.

Section 12.02 deals with a situation when the issuer wishes to change or modify the indenture itself, whereas what we are proceeding under is a different section

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entirely, Section 5.06, which contains certain mandatory provisions which must be done in the event of a merger.

So that the procedures under the two sections are quite different. And consent of the debenture holders, which seems to be the principal argument adduced by the objectors, is required only in a Section 12.02 situation where the indentures are proposed to be changed.

The second point of --

THE COURT: Don't you have to have a new indenture here?

MR. BLANC: Yes, your Honor, that was the second point I would mention. You do need a supplemental indebenture which Section 5.06 requires. In fact, that is in preparation now. Of course, that would not be executed until the merger itself were about to be effected.

Secondly, 5.10 requires notice to the debenture holders and that also will be given once, hopefully, we have a date of the merger of which to inform the debenture holders.

I might add on that, your Honor, that the purpose of Section 5.06 is to preserve the rights of debenture holders by putting them in the same position of the common stockholders and guaranteeing them that after such a merger as is contemplated in Section 5.06 they have

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the right thereafter to convert into common stock so that their rights are not prejudiced.

This is a beneficial section to the debenture holders -- I am sorry, not into common stock. In the situation of a merger, under Delaware law, Section 253, either common stock or other securities, or other property as is contemplated here, which includes cash, so that the debenture holders and the present common stockholder march in parity into the future and have the same rights.

That is the contract that the debenture holders purchased.

Now, your Honor --

THE COURT: I am not sure why the sixty-six and two-thirds per cent provision in 12.02 doesn't apply to the supplemental indenture which you say will be executed in due course under 5.06.

MR. BLANC: Because, your Honor, under 12.02, that is where there is a proposal to change or modify the indenture, especially in a situation where the rights of debenture holders --

THE COURT: We are going to change or modify the indenture here, aren't we?

MR. BLANC: Not really, because Section 5.06 is where we are proceeding under and that contemplates this

5 jklk

precise situation.

Section 5.06 is what protects the rights of the debenture holder and it itself contains the procedure under which we are authorized to proceed.

Section 5.06 mandates that we produce a supplemental indenture which guarantees that the rights of debenture holders are preserved. And, your Honor, if I may, the discussion that the objectors have purported to include in their reply brief, the Beaunit case, simply confuses and misses the point of that case.

THE COURT: Is that the Beaunit case?

MR. BLANC: Beaunit, yes, that case, among other things, stands for the right, for the proposition that the language, "Other securities or property," includes cash, to which your Honor just alluded, and I do not think that there is really anything more to add on that. It seems clear from the face of the opinion itself.

THE COURT: He says that here, talking about Beaunit -- this is the top of page 9 -- the convertible debenture owners here are not being offered a ratable share of common stock of Thyssen. What about that?

MR. BLANC: Well, they are not, your Honor, because the other property that is involved here is cash, which is the same thing that the common stockholders are

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being offered.

It does not seem to me to be a fair distinction of the Beaunit case because the principle that's being upheld there is that other securities or property may be used.

In that case it happened to be securities of the parent of the successor corporation. But here it is cash. But the principle that is applied is the same.

THE COURT: Mr. Rome.

MR. ROME: My name is Morton Rome. In the absence of my brother Edwin, I am adopting the point of view of the objectors.

Your Honor put your finger on the matter when you pointed out in Section 5.06 that with the consent of two-thirds there could be an amendment of the indenture with respect to various provisions, except with respect to one of the items trying to be accomplished here, namely, impairment or alteration of the indenture.

Yet in this very proceeding, assuming what my friend, Mr. Blanc, has said is so, with less than two-thirds assent in connection with a merger, not even complying with Section 5.06, Supplemental Indenture, 12.02, an attempt is being made to impair or alter the conversion right which is a contract right.

THE COURT: He says that the sixty-six and

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two-thirds per cent provision in 12.02 does not apply here and the supplemental indenture which is referred to in 5.06 will protect the debenture holders.

MR. ROME: Let's see, sir, how it does in fact protect. Number one --

THE COURT: First, why does 12.02 -- why should we read that into 5.06 in this situation?

MR. ROME: Because, sir, of two factors. Number one, a supplemental indenture will be required as a matter of law and language under 5.06.

THE COURT: Yes, but he says it is a different situation, that 12.02 does not apply to this kind of a situation at all, so although they both talk about supplemental indentures, you have got to look at the context to see whether or not 5.06 or 12.02 or both apply, and he says when you look at the context of each section, it is clear that only 5.06 applies.

MR. ROME: Fine, sir. That assumes, sir, that 5.06 is mandatory, has superiority over 12.02, and is per force right on the face of the debenture whereas if you look at the wording of the debenture itself, in turn -- the debenture terms are printed at the outset of the indenture -- not a word is said on the reverse side of the debenture concerning this so-called mandatory 5.06 provision that

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supersedes, according to my friends, any other provision of the indenture.

The very wording of the debenture itself, on the reverse side, and I call your attention, your Honor, to the Van Gammett vs. Boeing case, where the Second Circuit has held that rather than the provisions of the 100-page indenture governing, to a security holder, the wording of the debenture itself would be the most intelligible and understandable reference point.

Can my friend explain why there was omitted from the reverse side of the debenture the so-called mandatory paramountcy of Section 5.06?

THE COURT: Mr. Blanc?

MR. BLANC: Yes, your Honor. In fact on the reverse side of the debenture, if you have page 4 of the indenture in front of you, which has the reverse of the debenture on it, there is in the third paragraph --

THE COURT: No, I don't have it here.

At least I don't have it where I thought I had it. Is it attached to --

MR. BLANC: Here you are, your Honor.

THE COURT: Go ahead, Mr. Blanc. Page 4.

MR. BLANC: Page 4, your Honor, the third paragraph, beginning "Subject of the provisions of the

indenture," and skipping over some language, it says, "The holder has the right to convert that debenture into fully paid and non-assessable shares of common stock," et cetera. And then four lines from the bottom of the page, "subject to such adjustment, if any, of the conversion rate and the securities or other property issuable upon conversion as may be required by the provisions of the indenture."

That is the precise language that we are referring to in Section 5.06, your Honor, which addresses the situation, where other securities or property may be issued in such a circumstances, or in the case of cash, may be exchanged for the debenture, and I can't imagine anything more specific on point than that.

MR. ROME: To which I may reply, sir, if you look at the index, Roman numeral III, Article 5, Section 5.04, at pages 33 to 34 of the indenture, specifically provides for those situations which require an adjustment of the conversion rate. Not one word in Section 5.04 provides for any adjustment in the event of a merger.

Just by reading the index outline of Section 5.04 without more, it can be seen from the face thereof that the adjustment provision has no reference or applicability of whatsoever nature to a conversion rate adjustment as the

10 jklk

result of a merger consolidation.

THE COURT: If there is a merger, what do you look to?

MR. ROME: If there is a merger, you would look to the terms of this indenture which would have to be assumed by the successor or resulting corporation, both under New York law and under Delaware law, Section 255, as well as New York law, which governs this indenture.

THE COURT: Then you are right back to the same question, is 12.02 to be read into 5.06?

MR. ROME: That is right, sir. That is exactly right, sir. But it is our submission, sir, that in this posture, not only does 5.06 not -- cannot be considered paramount of 12.02, it cannot be considered paramount to the terms of the debenture, nor cam it be considered to be permissible in a class action to alter or impair. When two-thirds could not do so voluntarily, how, sir, can less than two-thirds do so involuntarily? That is the argument of the debenture holders who did not assent.

In this situation, a merger determined by the board of directors without one debenture holder or a minor amount of debenture holders assenting, could then be deemed to override a two-thirds group which itself couldn't amend and reduce, yet that is the position being argued.

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MR. KLEIN: Your Honor, may I be heard?

THE COURT: Yes, Mr. Klein.

MR. KLEIN: Your Honor, I had prepared, but in view of the fact we are arguing this right now, I had prepared a parallel analysis of a Collins Radio indenture with the Indian Head indenture, and just for purposes of responding here, I have the parallel clauses, your Honor, here. Would you hand that, Mr. Sklaver, to the judge.

We will mark later the Collins Radio indenture.

If your Honor will look at Section 12.02 with me, of Indian Head, and consider it in the light of 5.06, 12.02 requires that sixty-six and two-thirds per cent consent in one, two, three, three-and-a-half specific defined situations: For the purpose of adding a provision -- 5.06 is not an added provision. It is there already. So clearly under 12.02 you do not require two-thirds consent because the merger is added. It is not added. It is there all the time.

Secondly, 12.02 requires two-thirds consent where you eliminate a provision of the indenture. No provision of this indenture is being eliminated. So that as to those two conditions, no two-thirds consent is required.

Let us go on. Or of any supplemental indenture

or of modifying in any manner the rights and obligations of the holders.

Section 5.06 provides that in case of any merger into another corporation, such successor shall execute and deliver to the trustee a supplemental indenture, providing that the holder of each debenture then outstanding shall have the right thereafter to convert such debenture into the kind and amount of shares of stock and other securities and property, and if you read, "property" for "cash," as I think you must, and property receivable or cash receivable upon such merger by the holder of the number of shares of the common stock of the company, into which such debenture might have been converted immediately prior to such merger, then there has been no modification; there has been no change in the rights and the obligations.

On the contrary, that is the whole point. We wouldn't be here if we were unilaterally modifying the rights of the debenture holders and I wouldn't stand for it.

The point is, and your Honor, there is something really fundamental here that I think we ought to address ourselves to.

The Romes keep talking about creditor rights. We are not dealing here with creditor rights. We are dealing with equity rights. The debenture, the convertible

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debenture is a combination of a creditor and an equity provision. What he is asserting here is not a creditor's right. He is asserting the right to an equity position. And if he were right, that two-thirds consent were required, or that it is prohibited, you would have a fundamental change in really our economic and capitalistic system, because mergers are, of course, permitted by statute. You couldn't do it unless there were a statutory provision. Cash for common stock is permitted.

What's the equitable right here of this creditor? His equitable right is to get what he would have gotten if he had been a common stockholder.

What is the purpose of 5.06? What is the purpose of the contract? The whole idea is to see that this guy doesn't get shafted if there is a merger and that he must get, because of this handing over of the creditor right, his right always to convert into common stock, that he get that.

Now what he gets here, what will happen here, in accordance with the provisions of 5.10 -- and I think it is important, your Honor, to take a look at 5.10. 5.10 says that in case of a merger -- if I can short circuit it -- then the company shall give notice to the holders of debentures -- we don't have a merger yet, so obviously

14 jklk

5.10 hasn't come into play and can't until your Honor approves the settlement -- the company shall give notice to the holders of the debentures at their last addresses and so on, with at least ten days prior notice, and so on.

And then as a matter of fact, I believe --

THE COURT: What is the purpose of giving notice?

MR. KLEIN: I think because you are a registered owner, your Honor, the purpose of giving notice is to obviously tell a -- you know, your Honor, it is the same thing as out demand in our original action, that they get notice of the tender offer. The guy ought to know that there's about to be a merger. He can then look in the market and see whether he wants to sell, see whether he wants to accept this cash, see what he wants to do, and that he have prior notice with regard to the merger terms, and the whole function of the indenture is to give that kind of notice.

Another area that I would like to emphasize, because I think there has been a lot of dust in the eyes here, there is no Constitutional question, there is no Delaware law question, there is no New York law question. There is a question of contract -- beginning, ending, middle, that's the issue.

And what I find strange is that, you know,

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the whole function of the federal rules is to give you notice of what an objectant complains, and he puts in a 51-page contract claim, your Honor, a contract claim, and he never refers to a section in the contract on which he is relying on.

Now maybe we are beginning to smoke it out a little bit. But I would like to finally conclude that the contract specifically -- first of all, your Honor, you can take judicial notice that there is an act called the Trust Indenture Act in 1940; that all of these indentures of public companies flow from the Trust Indenture Act. The similarity is amazing.

You know, I have been looking at these indentures now, they are all virtually the same. Why? Because the statute requires these provisions. So if it is not 5.06 -- you know, if it is 5.10 in Beaunit, it is 5.06 here; if it is 5.06 in Indian Head, it is 4.11 in Collins.

But, your Honor will see, as we give them to you, they are all virtually the same.

Now, why do we show you Collins? As a matter of fact, your Honor, I have two more mergers. All have the two-thirds provision. As a matter of fact, Moody's lists two-thirds consent required for change or modification. No two-thirds consent was ever required in any of these

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standard clauses because by its nature, a corporation -- one of its rights is to merge -- is not going to prepare -- and it prepares the indenture itself -- obviously it is not going to prepare an indenture which is going to require two-thirds consent to do something which is essential in the nature of our system, namely, to have a merger. And to assure that this two-headed security -- one head is the creditor, one head is the equity -- that the equity provision is preserved and that he is not defeated by a merger, and it seems to me that that is at the core of it.

THE COURT: You said, when you told me about 12.02, that -- you used the phrase two-and-a-half and then you told me about the three --

MR. KLEIN: I said the two-and-a-half because it uses the word "rights" and it uses the word "obligation," your Honor. Maybe I should not have been cute.

THE COURT: Oh, I see, you meant the obligations part we are not concerned with. The rights part we are.

MR. KLEIN: Yes.

THE COURT: I guess that's what you meant.

MR. KLEIN: That's what I meant. I think also another reason for notice is that you have the right to convert, and under the statute, whether it be Delaware, it really doesn't matter, because these companies are

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incorporated in other states -- many states have an appraisal right. You give a convertible debenture owner notice because he may desire to convert and exercize his appraisal right because he thinks he can get a better deal that way. That would be another reason for giving notice.

THE COURT: All right.

Mr. Rome, Mr. Klein says that you gave me 51 pages without referring to the contract. What is the contract? Where do I find it?

MR. ROME: Sir, there are two contracts here. Number one, there is a contract by virtue of the debenture itself. And number two, as a result of the indenture, it is specifically a contract per se; it has been so held by our Second Circuit but --

THE COURT: What spells out for me the terms of the contract? Just all of the language?

MR. ROME: All the language.

THE COURT: In the debenture and the indenture?

MR. ROME: That is correct, sir, as far as I am concerned. All of the language in both --

THE COURT: You are saying that just the fact of the indenture, is a contract.

MR. ROME: That is correct, sir, and the

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Boeing case so holds.

May I add another point, sir? There's been reference here to several indentures, the Collins indenture, the Commercial Solvents indenture, as though that represented a custom. In the case of Chasins versus Smith Barney and Company, Incorporated, 438 Fed. 2d, 1167, Second Circuit, 1971, the Second Circuit has said that even if a party has been successful in showing that a custom and usage has been followed in an industry, the first litigation of such a practice is a proper occasion for its outlawry if it is in fact in violation, citing Opper versus Hancock Securities Corporation, another Second Circuit case, in 367 Fed. 2d 157.

Aside from the contract aspects that my friend, Mr. Klein, would hope that the objections would devolve down to, we, sir, say that there is a sale of securities involved in this proffered settlement and I point out, sir, that in the leading text of Bloomenthal on Federal Securities and Regulations, in paragraph 2.26(4) -- it is a 1975 Carte Boardman publication -- it points out that alterations in securities holders' rights involves a sale of securities, and that section goes on to say the following: "It might, under appropriate corporate law" -- speaking of an indenture -- "require the consent....in a typical trust

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indenture...to provide that changes in the interest rate, maturity date, conversion price and other specified matters can be accomplished only with the consent of all the holders of the debt securities, but that other changes can be accomplished with the consent of" a hundred per cent. "Relative to the question of whether a sale is involved is (one), the materiality of the alteration since it presumably affects the question of whether the security holder is being asked to give up something of value and (two) whether individual action" of a security holder is involved.

"Consider a change in corporate name accomplished by amending the articles. Has anything of value been given up by the shareholder? Consider similarly a change in par value without any change in the number of shares outstanding. Has anything of value been given up by the shareholder?"

They go on to say: but "Consider a change in terms of an indenture relating to the issue of debentures which results in changing the obligor in the event of a merger. Has anything of value been given up? The fact that there is security holder action binding on the pertinent class of security holders" itself "does not in itself establish that there is no sale of a security in view of the express provisions of Rule 145 which provides that

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certain corporate reclassifications do involve a sale.

"In one litigated case, a court has held that the extension of the maturity date of a" debt security constitutes a sale of a security.

"Other possible alterations include" the follbwing, and I skip: "Variations in the conversion price of a convertible security; variations in the conversion (or exercise) period with respect to convertible securities and options."

Now, sir, we have contended in both our original objections, which has been condemned because it happens to be 51 pages, as well as in our reply brief, that we have been too extensive and too broad in adding a surfeit of objections, one of which is that this very settlement proposes a sale of securities or an offer of sale of securities; it poses an offer to buy securities, without any registration with the Securities Exchange Commission.

We contend, sir, this is a violation of Section 5C of the 33 Act, Section 17A of the 33 Act, Section 29B of the 34 Act, Section 14E, at the least, the Tender Offer Provision.

Not a word has been addressed to that point in the matter and if we are right on that, sir, then this

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entire proceeding is infected with the vice and illegality of a securities law violation. That goes beyond the contract provision objection.

And we point out, sir, that the Supreme Court of the United States has said that if you claim an exemption from the Federal Securities Law, you must sustain it.

Not a word here has been said about such a sustaining.

MR. SKLAVER: May I be heard for a moment, your Honor?

THE COURT: Yes. Let me ask Mr. Blanc a question, Mr. Sklaver, which I have on my mind.

If and when it comes time to issue a supplemental indenture, will that be something that will be submitted to the court for approval or any action?

MR. BLANC: I think we plan to submit it to the court, your Honor.

THE COURT: I am not asking for it. I just wanted to know what you contemplated.

MR. BLANC: It is required under the indenture, your Honor, so it is not something that we would ordinarily need approval of, but since the entire proceeding is --

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THE COURT: I am not suggesting one way or the other what you ought to do. I am really just curious.

Yes, Mr. Sklaver.

MR. SKLAVER: Your Honor, I was going to express a few thoughts. I think Mr. Rome has attempted to take this Court into an interpretation of the indenture.

It is my view, and perhaps it is over-simplification, and perhaps I just do not see the problem, but it appears to me that that question is irrelevant, the interpretation of the indenture.

If any debenture holder feels that he has a right to purchase stock in the merged company, the new subsidiary, if that person has opted out of this settlement, opted out of this lawsuit, he has a perfect right to maintain an action in the State courts, to have that right determined, to have the State court analyze the indenture and the debenture.

This settlement will give money to the debenture holders. In effect, they will cease to be debenture holders.

The way they get out of the settlement is by opting out.

THE COURT: But they have chosen not to, and I think they obviously have a right to argue the merits of

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this settlement.

MR. SKLAVER: That they do, but to say that the settlement is unfair because they are not given the right to purchase new stock in the new subsidiary does not really address the issue of, is this settlement fair?

I have one other comment. Mr. Rome mentioned that this is a securities law case, a 33 Act situation, where the modification of the debenture constitutes an offer to purchase or sell securities.

I would say this, that this settlement and this arrangement certainly does not require a registration statement to be filed, as Mr. Rome suggests.

There are many, many lawsuits which fall into the technical definition of a purchase or sale where it has never been suggested that a registration statement need be filed.

For example, --

THE COURT: Has it ever been held that it does not need to be filed?

MR. SKLAVER: Let me put it this way, your Honor: In an action for resituation, not damages, but re-situation of a securities offering, by reason of a false and misleading prospectus, we know that the purchaser, the

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defrauded purchaser has several different remedies, one of which is recission.

Well, he does not want the securities; now that he has found out all the truth and all the facts about the company, he'd rather get his money back. Straight recission. That is a purchase and sale of a security.

When he turns back his stock and gets his money, he has now sold his security, and the company has purchased the security, and yet I have never heard of a situation where that settlement, the settlement of that lawsuit, or even the completion of the lawsuit had to be approved by the SEC with a registration statement.

I think that this is a wholly new concept.

In addition, my recollection of the Securities Act of 1933 is that there is an exemption for securities issued after a judicial determination on the merits of a settlement.

Now, as I say, I am speaking on the fairness of a settlement. I am speaking from the top of my head. I do not have the wording of the statute in front of me.

THE COURT: I'd be interested in your following that up, Mr. Sklaver, because, as you have been talking, I have wondered if judicial approval is not regarded as the

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equivalent of the registration statement, and if there is something specific, as you think there is, I would like to know about it.

MR. KLEIN: Your Honor, it is in our papers, Section 3(a)10 of the 33 Act, but only recently, you know, I have mentioned it because it was a large case in this district, the Talley case and at 64 FRD, 125, Judge Weinfeld approved a settlement last year or two years ago which involved --

THE COURT: 125 did you say?

MR. KLEIN: Yes, sir, 64 FRD 125, and there are countless other cases. It just happened to be one that I am in, which involved the issuance of warrants -- yes, of warrants, and involved the issuance of a debenture; the warrants I believe are now listed on the American Stock Exchange, the debentures are traded over the counter. There was an exemption available. There was no prospectus, there was no registration statement.

Now, there was a prospectus issued for the common stock into which the warrants were convertible, exercisable, but in terms of the settlement itself, it had nothing to do with the court, it was not submitted, you know, it was another issue, but under the settlement, the settlement provided, because the company did not have

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$6.40 in cash, which was what that settlement was, so it paid part cash, part warrants, part debentures, and the warrants and the debentures were exempt from registration under Section 5 of the 33 Act because the 33 Act promotes and recognizes in Section 3(a)10 settlements, court-approved settlements, your Honor.

May I -- a number of things have been said here that I would like to respond to. I wonder if we can't come back to square one, your Honor, because we are talking about a settlement. We start to get away from the fact. (a), we are talking about a settlement, and (b), what are we talking about a settlement of?

The settlement, the "of" is a claim of breach of contract that we made long, long, long before Mr. Rome ever came into this court.

We said that these defendants breached the indenture, and incidentally, we said it in a complaint which specified the sections.

If Mr. Rome's objections were in the form of a complaint, in my opinion it would be subject to a Rule 9(g) dismissal for lack of specificity, if I can pronounce that word, because it wasn't specific.

We came in and we said, as a result of the conduct of these defendants, one of two things happened under

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the contract: Either there's been a default, and the principal and interest become due immediately, or there's been a redemption, and they have not paid us the $1,033 which is due this year -- and incidentally, each year thereafter under the redemption schedule on the back of the debenture, the redemption price goes down, not up, down -- you have breached our contract.

All right, now we get into settling that claim of breach of contract. That is what this settlement is all about. It is settling the very claim that Mr. Rome comes in here two, three years later about, that we said for a couple of years was a breach of contract.

Mr. Rome is saying that we can't settle, apparently, because he is so certain that his claim is right. It is in that connection, your Honor, that I offered you on Friday, and I offer you again today, examples of convertible debentures, of companies which were merged under indentures substantially identifical, some of them identical, word for word, as this one here, where the debentures continue in existence, some of them listed on the stock exchange, on a convertible into cash.

I am doing that not to prove that, in fact, the contract provision is as I say it is, but to prove the reasonableness of settling the claim.

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Mr. Rome is saying -- your Honor, at page 30 of his main brief, and I do not take kindly to it, Mr. Rome says, the bottom of the page, last sentence: "The blocking of this settlement, it is submitted, should be a fortiori in this case where the omissionsand non-disclosures of the above material facts can well be held to have been made with actual knowledge, scienter or reckless disregard for the truth or consequences."

Now he is accusing me as a member of the court -- I almost can't think short of stealing, and I think this is a form of stealing that he is accusing me with, that a member of the bar could be accused of particularly here, and in the light of my approach and my feeling, my sense of responsibility -- It is one thing for Mr. Rome to say, you know, I think the guy is wrong. I think he has made an incorrect interpretation of the contract. But it is another thing to say willful and reckless disregard, and I submit to your Honor that Collins Radio and all the others at least indicate, I may be wrong, but I am not a knave.

THE COURT: He did not say you were a knave. He said you were reckless.

MR. KLEIN: Well, your Honor, in that connection, there arrived this morning, and I'd like to read

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it to you, and put it in the record, a letter from a warrant holder, on a very pretty card that I think is a United Nations card, and it says, "Dear Mr. Klein:

"For some three months we have not heard anything about the case of the valiant knight, W.K., the Second, against the Dutch Pirates. We trust that you will keep us informed when action is warranted on our part. In the meantime, many thanks for your efforts on our behalf.

"With best wishes, Ivor Wayne, PhD.

I think he owns 1,300 warrants.

In that connection, your Honor, we promised, and I don't want to give you all the correspondence that we have had and records of telephone calls, but in addition to that, I understand that on Friday there were nine telephone calls from debenture owners saying, "When are we going to get our money," "How did the settlement go," and "I hope it is going to be approved quickly," in substance, to that effect.

I think one of the most interesting, your Honor, in connection with the Rome objection is that there was a telephone call from William Hanley, and your Honor, Mr. Hanley's letters are annexed as exhibits to my main affidavit, and your Honor may recall that Mr. Hanley wrote me a blistering letter before the settlement was

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announced, in which he said, as I recall it, "If you settle for less than 90 or 95 for the debentures, if you settle for less than 40 or 45 for the common stock, if you settle for less than 10 or 15 dollars for warrants, I am going to get my own lawyer. It is the most irresponsible thing I have ever heard of."

And nevertheless, Mr. Hanley has now agreed to this settlement because he realizes that it is a fair settlement, and he called us on Friday -- he owns 42 debentures. And we will give you a list, without burdening your Honor, of the other holders who have approved the settlement.

THE COURT: Yes?

MR. KLEIN: Mr. Taylor informs me that one of the things that Mr. Hanley -- of course, he did not know about it, but he was pleased with accrued interest to be payable on the debentures.

May I, your Honor, respond to one other thing, and that is since we are talking about a settlement, and we are talking about the reasonableness of the settlement of the contract claim --

THE COURT: Are you, in effect, saying that even if there is this contract claim, this contract which Mr. Rome asserts exists, that it is appropriate and perfectly

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proper to settle it without getting -- well, go ahead.

MR. KLEIN: No. I am saying that it is appropriate and proper to settle the claim, even if there is a contract, there is a contract pursuant to which a claim can be made, and we made it; that under the facts of this case, these debentures should be either redeemed or held to be in default. But that is just a claim. I do not think it could be sustained -- or it has problems; I won't say could be sustained, but it has real problems.

What I am saying is that claim, it is reasonable, not only reasonable, but I think it is mandatory. I have had debenture holders ask me whether they could sue the objectant for restraining, for possibilities of arbitrary and capricious delay of their getting out so they can get this $844 now.

It is not that anyone is so thrilled with the amounts of money. It is that what they are thrilled with is to be able to get unlocked and to be able to get freed now. That is the name of this game.

THE COURT: All right.

Mr. Rome, in your reply brief you referred to Section 3(a)10 which Mr. Klein just talked about, and you say that the suggestion that it affords an exemption here is baseless, and then you talk about a fairness hearing

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which must take place before the offer to buy or sell.

MR. ROME: That is correct.

THE COURT: Why aren't we having that right now?

MR. ROME: The fairness hearing before the offer -- the offer has already taken place, sir. I say, sir --

THE COURT: You mean before the notice of the settlement went out?

MR. ROME: That's exactly it. The notice of settlement, sir, constituted a prospectus. The fairness hearing under 3(a)10 -- and I suggest, sir, that there has not been one decided case, not one decided case on the issue whether a fairness hearing in a judicial settlement of a class action -- whether the notice can go out to the security holders before either clearance with the SEC or the private fairness hearing has taken place.

Now there has been cited Lin Broadcasting as a no action situation. There has been cited the VTR situation. And I respectfully suggest, sir, that if research is done, you will find that there is no decided case that 3(a)10 applies and --

THE COURT: I am trying to find a copy of it. Is it attached to your main brief?

MR. ROME: It is, sir. I refer you to the following: The wording of 3(a)10 is in the appendix --

MR. KLEIN: Your Honor, it is in my brief.

MR. ROME: It is not in mine, because 3(a)10 was not applicable. It is one of the proponents' briefs.

If your Honor will read the wording you will see what I am driving at.

THE COURT: Yes, I have it now.

MR. ROME: If you will look at that wording, sir, which I do not happen to have before me, you will see it uses the phrase "after."

THE COURT: "Any security which is issued in exchange for one or more bona fide outstanding securities claims or property interests or partly in such exchange, partly for cash, where the terms and conditions of such issuance and exchange are approved after a hearing upon the fairness of such terms and conditions."

MR. ROME: "After." Now there has been an offer in this case before.

MR. KLEIN: Your Honor, may I respond to that?

THE COURT: Yes.

MR. KLEIN: There has been no offer before. This is a settlement. Just because he says this is an offering of securities doesn't make it so.

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The follow who owns the convertible debenture can keep the convertible debenture. This is a cash merger. It is all cash. There is no offering of securities.

But more than that, every argument he makes is based upon the premise, which I submit is fallacious and misleading, and that is there has been an impairment of his contract right. If there is an impairment of his contract right, he is not saying it is unfair. He is coming in on an extremely narrow legal argument. He is going to the securities laws, and he is looking at everything in order to come back to the dime, and the dime that he is sitting on is that his contract right has been impaired.

But it hasn't been impaired.

THE COURT: Getting back to 3(a)10, isn't what is contemplated in the first clause of 10 something that is going to happen after this hearing?

MR. ROME: Yes, sir, no question about that, sir. But you will notice, sir, that 3(a)10 does not apply and none of the definitional provisions apply under Section 17, because under Section 17, I believe it is (c)3, you will find that the antifraud provisions of the Securities Act are not applicable and override any exemption.

Moreover, 3(a)10 is under the 33 Act.

You will notice, sir, also, there is no

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exemption under Section 14, the Williams Act, for this situation, and my friend, Mr. Klein, would certainly not say that the notice did not constitute an offer to buy debentures for an amount equal to what is the equivalent of $32.50 per share? The very notice says that. Where is the exemption under Section 14 of the Williams bill? There is no exemption.

Moreover, sir, there is a constant theme that we are trying to upset a settlement between those who assent and the defendants. We are not. I have said so in our reply brief. It was said so by my brother this past week.

Those who assent to the settlement have a perfect right -- it has been explained in our reply brief -- to settle.

The fact that these gentlemen have made it a package settlement makes our objection go to the heart of the settlement. And if that theme alone could be raised, it could be seen that we are not objecting to Mr. Klein settling; he could settle for ten cents on a dollar so far as we are concerned.

All we say is he has not the right, under Hansberry vs. Lee, decided by the Supreme Court, to represent the non-assenting convertible debenture owners.

THE COURT: Yes.

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MR. KLEIN: May I respond to that, your Honor?

First of all, you can't have it both ways. The notice is a notice. It is not an offer. It is not both.

The whole point is it is a notice. You may not get it. Why did we get nine phone calls on Friday, because an offer had been made? No, we got nine calls on Friday because people wanted to know whether or not an offer would be made and whether or not it was going to be concluded.

The hearing in 3(a)10 is exactly what we are having here now, because no offer has been made. No offer could be made because it is subject to this Court's approval, and Mr. Rome knows it.

I am really a little tired of being harried with Hansberry against Lee, which is a discrimination case, and it is extraordinary that the only basis for the claim of misrepresentation and class representation is based upon this case, and, your Honor, I have a copy -- I know it is sometimes hard to get ahold of these cases, and here is the United States Supreme Court -- Mr. Rome read this case -- on page 44, the Court says: "We decide only that the procedure and the course of litigation sustained here by the plea of res judicata do not satisfy these requirements."

What was the claim? Your Honor, there were a bunch of people who owned land --

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THE COURT: Where did you just read from?

MR. KLEIN: From the opinion, page 44. On page 44.

What happened in the Hansberry against Lee case was that there were a bunch of people who owned land together and they tried to keep blacks out. And they had a proscriptive condition. They all signed an agreement and they went in -- they had the nerve, your Honor, to go into a court in Illinois and say that 95 per cent of these landowners have agreed to keep blacks out.

In fact, there were only 54 per cent.

But on that basis, the court in Illinois said, "Okay, we will affirm the right to keep blacks out."

Hansberry, of course, being a black, and Hansberry being a successor to one of the people who had entered into this agreement, so Hansberry comes into court, and he says, "This agreement can't bind me. How can they bind me on that?" And the defendant said, "Oh, it was a class action, and, anyway, that first case was res judicata."

You know, your Honor, the facts of that case are -- leaving black and white aside, there was a failure of due process.

I would like to read to your Honor, because we keep getting hit with this irrelevant case, and I would

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like it on the record, at page 42, Mr. Justice Stone said, "With a proper regard for divergent local institutions and interests," and then he cites the Jackson County case, "This court is justified in saying that there has been a failure of due process only in those cases where it can not be held that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it."

And here we are sitting in a case, your Honor, where Rule 23 requires just that kind of protection, contra Hansberry vs. Lee.

And then the court went on at page 43:

"Nor do we find it necessary for the decision of this case to say that when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact of law, a State could not constitutionally adopt the procedure whereby some of the members of the class could stand a judgment for all, provided that the procedure was so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.

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That is exactly what's happened here. There is no difference.

For Mr. Rome to come in and to say that a class member is not representative of an objectant class is an anachronism and your Honor pointed out what he is really talking about is two classes, and that is nothing that has ever been heard of.

To cite Hansberry against Lee for the proposition that this class is not representative or that we are not representative it seems to me, your Honor, is wrong on the facts, wrong on the law, wrong on the opinion, and just plain wrong.

MR. ROME: Then I take it, sir, that Grinnel is wrong when Judge Moore said, in Grinnel, relied upon so heavily, "There is no allegation that the settlement conflicted with or was adverse to any class member's interest," at page 465 of Grinnel, 495 Fed. 2d 448, 465, which was the makeweight in that case by which the Second Circuit justified departure from the manner of complex litigation. That was decided some 34 years after Hansberry vs. Lee. This is a case where we assert, sir, that Mr. Klein cannot represent legally --

THE COURT: In the Ace case, as Judge Moore says, in the preceding sentence to the one you just read, there

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were different groups vying for recognition. We do not have that here, do we?

MR. ROME: Yes, sir, we do have in this sense, sir --

THE COURT: You were aware, were you not, of these settlement negotiations, that they were going on?

MR. ROME: Yes, sir.

THE COURT: Now you come in and object the day before the time runs out. Why didn't you object sooner? Why didn't you put yourself in the position of the different groups in Ace, one of the different groups?

MR.ROME: Sir, when the --

THE COURT: As I recall that, isn't it correct that the settling parties dealt first with one group; things didn't work out too well so they dealt with another group; isn't that correct?

MR. ROME: Yes, sir, but I am not in that position, sir.

THE COURT: Why not? Of course you aren't, so why aren't you like Grinnel?

MR. ROME: I am not like Grinnel for the following reasons, sir:

In this particular case, not only is there an attempt to bind the contractual several rights of the

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convertible debenture holders, but via this common stock to which we would have a right to convert there would be a freeze-out which, as I understand it, under Green, would be anathema in this circuit, in any event, and not distinguishable by Merr against Libby.

And remember, sir, the withdrawn merger was March 4th, the alleged settlement, the amendment of the complaint, the final second amendment of the complaint took place in July, I believe it was around the early part of July.

The stipulation of settlement -- and, by the way, the terms were not known to myself or any of the members of my family who hold securities until the announcement came out under date of the postmark of August 16.

I am not aware, sir, that I am obliged or any member of the convertible debenture holder class is obliged, where we are represented by a fiduciary of that debenture owner class, to intrude at that juncture in the very settlement negotiations, as to which we already have had a lead counsel appointed.

THE COURT: I am not sure that you are advised to do so or not, but the fact is we do not have the same kind of a situation as occurred in the Ace case.

MR. ROME: We have a stronger case, sir. We have

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a case where by contract the rights of the convertible debenture holders cannot be altered or impaired.

THE COURT: It seems to me that is a different point.

You just mentioned the term "freeze-out"which you use at page 10 of your reply brief and the point about the Marshel and Green case. Is this correct, or what is your answer to this question, Mr. Rome? Are you saying, in effect, that you oppose any settlement except one which would give you what you'd get after you successfully litigate it?

MR. ROME: No, sir.

THE COURT: What is it, then?

MR. ROME: I say, sir, we oppose any settlement under which the convertible debenture holders are required to accept in lieu of the right to convert into common stock a fixed sum. We would only agree to a settlement under which the right to convert would be into an equity security a la El Paso and Beaunit which would have the right to rise in value.

THE COURT: All right. I think you have touched on this, Mr. Rome, but I would like you to be as specific as you can.

I believe you claim that the notice about the settlement was incomplete, but what should have been in it

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that wasn't put in it?

MR. ROME: The main item that should have been in it that wasn't, sir, as I see it, is the fact that debentures were several contracts, which, by their very terms, provided that they could not be altered or impaired save by the individual affirmative consent of the holders of the debentures outstanding. That represents a main material point.

THE COURT: That is a statement of law, not what the settlement is intended to do.

Is that something that should be in the notice?

MR. ROME: In my judgment, it is not a statement of law. It is a statement of the factual rights of a debenture holder.

THE COURT: All right, it is an interpretation of what the indenture means.

MR. ROME: Aside from an interpretation, sir, --

THE COURT: So you are suggesting that the notice should have contained a statement that the people who are proposing this settlement are doing so because they think it is valid, but you can argue to the contrary. That should have been in the notice.

MR. ROME: Yes, sir, I believe it should have been. It should have contained a statement --

THE COURT: Now, the notice also specifically

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provided that if you did not like this you could come in and object, as you are doing. Isn't that sufficient?

MR. ROME: No, sir, I do not believe so, because, as a matter of fact, there are many unsophisticated investors who don't even know what the terms of the indenture provide.

TEH COURT: But an unsophisticated person always has the right to consult a lawyer, as apparently you have done. I do not mean to suggest that you are unsophisticated, however.

MR. ROME: No, sir, but I do not believe --

THE COURT: But here this objection is being raised.

MR. ROME: I do not believe, sir, that the rights --

THE COURT: Here the objection is being raised that you think makes the notice inadequate.

MR. ROME: I do think that that represents a material fact which goes to destroy the validity and adequacy of the settlement, yes, sir, under TSE vs. Northway and other cases decided in this circuit.

THE COURT: You are saying that if you had not been on the scene, nobody would have noticed at this point.

MR. ROME: As it turns out, that is correct,

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and the fact that I am a lone properly-filed objector in the sense of a class action objector to this class action does not necessarily derogate against the fact that none of the other thousand debenture holders who did not affirmatively assent are likewise, in my judgment, also objectors.

THE COURT: That is something we won't know about, I guess. Can't I assume that the absence of objection from anybody else either means that nobody paid any attention to this or that if they did, they decided not to object?

MR. ROME: No, sir, no more than you can assume that the fact that they did not object meant, as far as they were concerned, they did not assent.

THE COURT: They did not what, assent?

MR. ROME: In other words, one deduction from the lack of objection is no more strong or no more worthy to be followed as a path than the other.

THE COURT: Well, that may or may not be so.

MR. WEINSTEIN: May I be heard on that point, your Honor?

THE COURT: Yes.

MR. WEINSTEIN: Your Honor, I have been designated as lead counsel for this Court in many cases, also in the State court and also in the Third District.

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When the notice was prepared by Mr. Klein, he sent it to me. I went over it very carefully. It is absolutely legal in every respect, and as a matter of fact, it contains more information than the ordinary notice that goes out where a class or derivative suit is being settled. I looked over it very carefully and I approved it and I say to your Honor, if you examine any of the cases that have been settled in this court, you will find that this notice contains every legal requirement that is required.

If a warrant holder or stockholder does not like it, all he has to do is to opt out and start his own action for his personal damages only.

MR. ROME: I would be happy to ask the Court if you have any further questions that are not covered --

THE COURT: I am looking over my list, Mr. Rome.

Yes. You complained about the lack of discovery here. Why? What discovery do you think should have been conducted?

MR. ROME: For example, sir, as I understand it, and I could only glean this from the docket and what I was told by telephone when I spoke to, I believe, Mr. Taylor, in the Brucker case, I know of no instance where, for example, the Chase Bank or the 14 other banks from

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whom fifty million dollars was borrowed in an agreement in November or December of '74, prior to -- pardon me -- '73, prior to the second tender offer, whereas the first tender offer specifically said we do not intend to acquire any further stock -- when not less than two months after that, the Chase Bank and 14 other banks loaned fifty million dollars to the Thyssen group which monies were used for a tender offer, approximately eight or nine months later.

Now, that in and of itself, from a discovery standpoint, if the Chase Bank, for example -- and the purpose of the loan would normally have to be set forth and would be in the work papers -- if the Chase Bank's application or the 14 other banks' discovered documents would show that in truth and in fact, at the time that the Thyssens made an offer to purchase between 30 and 32 per cent, they did not merely intend to buy 30, 32 per cent, but this was a step in a single integrated transaction to take over what we call creeping control acquisition, the tender offer to be followed by a squeeze-out merger, that would have been highly relevant to determine whether or not the intent existed which in my judgment is necessary scienter under both the Williams Act as well as 10(b)5. And it was, for example, that discovery that was completely absent here.

Next: there is stated --

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MR. SKLAVER: May I respond, your Honor, and perhaps short-cut this?

THE COURT: No, let Mr. Rome go ahead.

MR. ROME: It was stated in the original tender offer that all the funds of the Thyssen Group came out of its "general funds." I submit, sir, on discovery, I do not believe that a company that threw off a seventeen million dollar profit would have available in its own funds, not in a bank fund, not in any other Thyssen interests, the fifty-five-odd million dollars that it would have taken to buy 30 or 34 per cent of Indian Head.

That in itself would show whether this was a step transaction to acquire a hundred per cent.

Next: If you will notice the interlock of directorate, you have a Mr. Katzenbach, who is chairman of the board of White Weld; you will notice Mr. Genillard was the chairman of the White Weld Trust, and the chairman of the Swiss Society which controlled White Weld in Switzerland and the adviser of the Thyssen Group, and you will find under Section 8, for example, of the Clayton Act that there was an interlock of even investment bankers, it raises the suspicion of possible antitrust violations.

Why does Indian Head become so attractive?

You also find on the supervisory board of the

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Thyssen Group, the following personnel, personnel in Glass Containers of Drumity, personnel in Container operations abroad, which are a fit with the Indian Head Group, and again such a fit could raise a potentiality under the Sherman Act. Nothing like that was so indicated.

This is the type of discovery, sir, that in my judgment was not done. We do not contend that there should have been a redemption. The Thyssen Group were perfectly free to make a valid tender offer. We do not contest that. It is what they did not say or should have said that would lend credence to either injunctive relief or other relief. Secondly, you will note, sir, that the convertible debentures were dealers for the New York Stock Exchange. There was no requirement per se that the convertible debentures be listed. There was nothing in the indenture that says they were required to be listed. But there was an original promise in the April prospectus of '68 that there would be a listing -- again, in my opinion, violative of the original promise, and that has been upheld, I believe, sir, in an early case in '63.

This, I hope, would answer your question.

THE COURT: All right.

MR. KLEIN: Your Honor, I am terribly sorry. There are two shareholders here. Forgive me. They have been

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here since 10:30. They wanted to address a few words. I am terribly sorry. I am sure you would want to hear them.

THE COURT: All right. Let's get to them in just a minute.

Go ahead, Mr. Sklaver.

MR. SKLAVER: Your Honor, we have started discovery by serving extensive interrogatories. Those interrogatories were served after we had the hearing at which the defendants withdrew the proposed merger. There was some talk about starting settlement discussions. Those settlement discussions did not start until sometime after we had served those interrogatories. They were very extensive interrogatories. And in proposing this settlement, and I think Mr. Klein has indicated the same thing to me, we are assuming that we can prove liability. We believe that we can prove that the tender offers, the documents, were missing and omitted material information, and --

THE COURT: Do you include within what you believe you can prove the points that Mr. Rome just made?

MR. SKLAVER: Yes, your Honor.

THE COURT: He talked about a showing that there was something which he calls creeping control underway here,

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that the money did not come from the general fund and that the interlock of directors somehow shows something --

MR. SKLAVER: Absolutely. We have alleged that. We believe we can prove it. But, okay, so I prove it. I still have to prove damages.

THE COURT: You might have been able to negotiate a better settlement if you proved it rather than just assumed it.

MR. SKLAVER: Your Honor, in negotiating this settlement, I, for one, negotiated from the position that I can prove it, not that maybe I can prove it.

I mean, I recognize that every lawsuit contains an element of uncertainty. I can't say that I negotiated from the point of view that I am going to prove it a hundred per cent. But maybe I did from ninety-five per cent, because, as I mentioned the other day, in terms of suppose I prove it, how much money can I get on the issue of damages? My expert tells me that the $32 we negotiated is a fair price. I concluded, based upon my expert's analysis, that if I won liability and if I proved everything on the issue of damages, I could get in the pocket of a warrant holder $6.

Now, if the most I can put in his pocket is $6,, after the trial, including the issue of damages, then

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I think $4 now is very fair.

So we have assumed that we can prove everything that discovery would have uncovered.

THE COURT: All right. Now you say you have a stockholder or two?

MR. KLEIN: Could I just respond to that discovery?

On that discovery argument, very quickly, your Honor, there is no reason for discovery, it seems to me, as a matter of law. What the facts are is that the company completed acquiring thirty-three per cent, I think it was in October 15 or 18 of 1973, from a tender offer statement, an offer to purchase, which disclaimed any intent to merge.

Eight weeks later, eight or nine weeks later -- and this, of course, is all in the papers -- I think it was around the 15th of December, the company entered into the fifty million dollar financing agreement.

Five or six months later the company makes a second tender offer for all the common stock. What do I want to interrogate anybody for? What kind of discovery do I want? That speaks for itself.

On the summary judgment papers which are before you, Mr. Powers put in an affidavit. I assume he is an honest man. I do not have to cross-examine him. He says,

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"I don't know."

I don't care whether he knew or not. If I am going to try this case, he may say he did not know, but that does not show, in terms -- as a matter of fact, you are much stronger, your Honor, if you rely on those facts than if you examine, because if you examine, you are going to get all sorts of dead fish that you are going to have difficulty explaining away.

I would rather come in on those cold statement of facts and try to persuade your Honor about that intent. These people went eight or nine weeks later, picked up fifty million dollars, six months later used the fifty million dollars to merge, and they say there was no intent.

I do not need to discover and I think it would be bad lawmanship if I had discovered.

The two shareholders.

MS. KALIN: Your Honor, I am Sharon Kalin, I represent some shareholders as well as my firm. I am an arbitrage trader with Oppenheimer & Company in New York.

I address myself to the reasonableness and fairness of this settlement. We have been warrant holders for quite some time. We are happy with this settlement. It looks like perhaps these court proceedings that have been drawing on for so many months may come to an end.

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We'd like very much to be paid as soon as possible. We have been carrying a position for a long time. We have many shareholders, as well as warrant holders and debenture holders in the firm, who have expressed the same interest. They would like to get paid, they would like these proceedings to come to an end, and this is the way we feel about it.

We feel it is reasonable and fair with all things considered. This could drag on for many years.

THE COURT: What is your firm?

MS. KALIN: Oppenheimer, members of the New York Stock Exchange.

THE COURT: Thank you.

MR. SHULDENREIN: Your Honor, my name is Morris Shuldenrein. I appear here as a layman. I own 7,500 warrants. I am in the unfortunate position of being, or fortunate, perhaps, to somebody's viewpoint, of being one of those who would only get fifty cents per warrant for the settlement over here.

I purchased them approximately at about $2 a warrant, plus, of course, my commission.

I see a lot of high-powered legal talent here. I feel somewhat, as a layman, at sea in a flotilla of lawyers. I am afraid of being torpedoed.

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Mr. Klein said prior to this that he wanted to see that the creditor does not get shafted. Obviously I do not want to get shafted.

It seems to me that Indian Head and Thyssen are multimillion dollar concerns, seeking to merge to protect their own interest. They do not do it to improve the beauty of their complexion it is obvious. There is money involved, whether for operating expenses, taxes, and gosh knows what.

I did not buy these warrants to hold on to them till 1990. I bought them because I felt that the company, Indian Head, which I have known about for many years, was a good company. I felt it was well run.

It is true I came into the picture at a late time. But I feel that it had a monetary value far above this fifty cents that's being offered now.

I feel, for instance, that if this company was allowed to operate on its own that my warrant would increase to a great extent. I do not intend to hold on to it and let it go into my estate. I am not going to be here in 1990. I am well aware of it. But I did not buy it for that purpose.

I feel that the offer being made is not fair. I do not think that $2.50 for this warrant is a fair price.

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I do not want to impede this settlement. I want it to go through. I want my money just as much as anyone else.

By the same token, this is being traded on the American Exchange. There was a possibility for this warrant to go up, if this had not started, and this legal situation had not occurred.

I realize that this warrant could be worth more money. Mr. Klein points out that Mr. Hanley said that he'd be much incensed if less than $100 was offered for a warrant. I will settle for $5. I will take that $4 that's offered to the other warrant holders. I understand that no tort was committed.

THE COURT: How much will you get under this settlement?

MR. SHULDENREIN: $2.50. There's about 350,000 warrants outstanding that are in my class, according to the notification from the court. If $1.50 more per warrant was issued to 350 other warrant holders in my class, we are talking about four, five hundred dollars -- thousand dollars additional. My mathematics may be bad. Probably it is a bit more. But I can't see with the millions of dollars that I have heard bandied about here, why we are being put in this position.

I feel that these companies have an interest

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in this here, and it is worth money to them. I feel that I am entitled to more than fifty cents, minus my commission. I have paid brokerage commission. It is being traded in the open security market, governed by the rules of the United States and the Exchange. Now it is a chance of this thing going out the window and I'll have to take what's offered. If I have to I have to, I accept that. There is nothing I can do about that. The thing that I feel is that I do not have the right, nor does anyone, to come in and put their hands in the pocket of somebody and say, "Give me money."

By the same token, I do not think a corporation has the right to put its hand in its pocket and put a clamp on it and not pay out a fair value, when they seek to achieve something which means millions of dollars to them.

I do not think it is right for me in my class and probably all others similarly situated to get fifty cents. I think I am entitled to more money. Obviously if I were offered $4 I'd be exceedingly happy.

Thank you very much, your Honor.

THE COURT: Anybody want to address what Mr. Shuldenrein has just said?

MR. SKLAVER: Your Honor, I think I have to

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respond to that. In determining the $4 value for the warrants, we recognized that there was a very small number of people who would not get the full $4, those people who held the warrants throughout this entire lawsuit, and we have alleged that the tender offers also counstituted part of their damages because of the delistings, that the ultimate settlement should be $4, that we could not really find a way, at least I could not, to balance every tiny little facet of it, that the number of warrants falling into this class is so small that to break up a settlement offer it would be for the tail to wag the dog.

Now, we recognize that we might have a problem, but yet we console ourselves, if you will, with the idea that these people who were in this position were those who bought their warrants during the pendency of this lawsuit, after the delisting, after the merger had been enjoined, and would not suffer any loss, that maybe they are not going to get as much as somebody else, but really they bought it at a time that they knew that the situation was very much up in the air, that there was --

THE COURT: Is Mr. Shuldenrein one of these people?

MR. SKLAVER: Yes. That there was an attempt initially to work the merger where the warrant holders

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would get nothing; that the people who bought after all of this happened and who fall into this little class, bought it with the idea, and at the time it was known that they were trying to be wiped out completely, and it was a rank speculation in there, your Honor, and nevertheless, because of the way the market moved, and the price that the warrants were traded over the counter, these people nevertheless did not have a loss, and so all of that put together we decided that you can't let the tail wag the dog. We have to do what we feel is best for most of the people, the greatest number of people, and Shamrock is taking as big a beating as anybody in here. I think they own --

THE COURT: Mr. Shuldenrein?

MR. SHULDENREIN: Well, I do not like to be a tail wagging any dog. I have said that I'd be glad to take more money. By the same token, I do not want to go down the drain just because I am a minor individual. I think when a settlement is made, everybody's interest is to be considered, whether it is a hundred million dollars or it is five thousand dollars.

THE COURT: I think you are right about that, Mr. Shuldenrein.

MR. SHULDENREIN: Thank you, your Honor.

MR. KLEIN: Your Honor, I absolutely agree with

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you. When did you buy yours?

MR. SHULDENREIN: I bought them in the spring or so of this year. Incidentally, when I purchased them, Indian Head was being traded over the counter, as you well know, and my right -- my stock was -- my warrants were purchased on the American Stock Exchange. I do not know the rules and regulations. I do not know 12.02 or 5.06 or anything like that. I do not know the rules of the SEC. But I see no reason why they did not suspend trading in this if the situation is as it is, by a request of Indian Head, if nobody else.

MR. KLEIN: Your Honor, Mr. Shuldenrein bought at $2, he says, plus commission, and he is going to make a profit of twenty per cent on a speculation, after the announcement of the merger and after the withdrawal. It is only coincidental actually that that class is included here at all. It really only is included because of the merger here, where all the warrants are to be exchanged. So I really do not think that the hardship there is to him. Though I wish for his sake he could make more money.

MR. SHULDENREIN: I also lost interest, Counsel.

THE COURT: I'd like to take about five minutes to go over my notes and make sure I have asked you everything that I have had in my mind. We will take five minutes.

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(Recess.)

THE COURT: I have got just two more questions.

I think perhaps, Mr. Blanc, the first question is for you.

I have in mind Green and Marshel. What is the importance or good business purpose that is involved here?

MR. BLANC: Your Honor, there are several. A privately held company, for example, may wish to run greater risks in the conduct of its affairs than it can when there are public security holders present. If the company wishes to enter into investments it has to presently keep in mind the fiduciary obligation to public minority shareholders.

THE COURT: Well, they still have fiduciary obligations, don't they?

MR. BLANC: If there are no public shareholders, your Honor?

THE COURT: They can't violate the securities laws, for example.

MR. BLANC: That is quite right, your Honor, but they would not have a body of people who are specifically entitled to those protections; if the entire ownership is within the Thyssen Group and the Thyssen Group

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decides what to do, it has no conflicting obligation. That would be the second element, your Honor, that I think would be fairly advantageous here.

The question whether or not opportunity should be Indian Head's or the opportunity should be Thyssen's, under the various possible forms of corporate investment, here those types of questions, possible assertions of conflict of interest are removed.

THE COURT: I guess Mr. Rome would say he agrees what you are trying to do is freeze out the people who have an interest here.

MR. ROME: It would do more than that, sir. We would point out that Justice Douglass said in a footnote to Affiliated Youth that the obligor or the corporation has a fiduciary duty to the entire community of interest -- including creditors, because even if the common stock were eliminated, there would still be publicly held debenture holders who would be creditors, and therefore both Affiliated Youth and the footnote written by Judge Oakes in Van Gammett vs. Boeing would apply. There would be creditor beneficiaries in the form of convertible debenture holders, convertible into cash instead of stock.

MR. BLANC: Your Honor, the indenture governs the obligations to which Mr. Rome refers. There is no such

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kind of problem in this situation here.

THE COURT: I am sorry, Mr. Blanc, I did not hear that.

MR. BLANC: There is not a problem of that kind of situation here, because there you have a contractual series of obligations which the company has to follow. The difficultyinstead with public stockholders is that you have equity interests to observe , whose rights you have to observe , and the procedure that is authorized under Delaware law, which is what's proposed to be followed here, as in any such situation, is that those conflicting interests may be removed, if the company that wishes to do so has more than ninety per cent of the equity.

Your Honor, if I may very briefly, there has been so much talk about the indenture, it is difficult to address this continual series of numbers that Mr. Rome throws out, and the elemental point here is that Section 5.06 specifically controls this situation. 5.06 contains a clear direction that there must be a supplemental indenture, and it must provide certain rights to the debenture holders. That is the entire sum of that question. There is no question of going to Section 12.02 to find languauge which addresses a completely different situation. There is no alteration or impairment of the rights of the

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debenture holders. That is what Section 12.02 speaks of.

Here there is a specific provision that guarantees those rights.

Secondly, Mr. Rome has repeatedly referred to the securities laws in a context so bizarre that, of course, there is no case on point directly. We found, we think, certain analogies. We have cited 3(a)10 to this Court because Section 3(a)10 by its very nature applies to an issuance of securities. That is what the 33 Act is about.

There is no issuance of securities here. But a fortiori if Section 3(a)10 recognizes, in the context of the issuance of securities, that a court hearing such as this, and an approval of the fairness of the transaction, such as we ask this Court to do, affords protection then when there is no issuance of securities and cash is being offered, it seems the point is so obvious that it does not need making, and yet Mr. Rome requires me to make it again as we have done in our brief.

THE COURT: All right.

(Plaintiffs' Exhibits 10 through 13 inclusive marked for identification.)

MR. KLEIN: Your Honor, those exhibits are the Collins Radio indenture which we have compared to Indian Head, including the provisions of 12.02 and so on, and they are

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just about identical, and Exhibit 13 is an index comparing the sections from Indian Head and Collins Radio, and I will affirm to the Court that the indentures largely follow the same provisions, that substantially all the issues of convertible debentures of companies which have been merged for cash, which now provide for conversion into cash, cash being the substitute for the word property under Section 5.06 or a comparable section, that all those indentures are comparable to and substantially word for word, in all of its provisions, in all of the sections that Mr. Rome relies on here to Indian Head.

In addition, your Honor, we have given you exhibits showing two new companies that were called to my attention. One is Thor Power Tool Company, with a convertible debenture which was merged into cash under an indenture similar to the Indian Head, and it is convertible into cash.

The other one is Southwest Airmotive Company. It is the same.

In addition, your Honor, we have, as we promised on Friday, given you a bound volume, Exhibit 12, of telephone calls. To the extent that we have the notes on all the telephone calls, I think we have got a good record, but it is not perfect.

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And I am sure there were other telephone calls.

All of our replies to stockholders, and the correspondence from stockholders.

THE COURT: Should these be for identification or just exhibits?

MR. KLEIN: Mr. Rome is talking about informality. I do not want to be informal. I am happy to do it either way.

THE COURT: Let's receive them.

MR. KLEIN: For identification?

THE COURT: No, let's receive them as exhibits.

MR. KLEIN: Yes, your Honor.

I am sorry, there is that letter that I read to you today, about the valiant knight and the Dutch pirates and I put that in.

(Plaintiffs' Exhibits 6 through 13 received in evidence.)

THE COURT: Mr. Rosenman, I had one more question.

MR. ROSENMAN: I just wanted to address what Mr. Blanc has already addressed, the question of the modification of the indenture.

I believe, your Honor, that the intervenors'

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case is basically that there is a change in the provisions of the indenture.

I have practiced corporate law for many years, have been involved with indentures of this sort, and I believe it is quite clear that there is no change in the rights of the debenture holders that is being effected by this situation. We are not modifying the indenture. The provisions of the indenture, 5.04 and 5.06, very clearly are intended to provide for modifications that occur during the course of corporate history.

When you enter into an indenture such as this, you give to the holder of the debenture the right to whatever rights the holder of common stock has.

Section 5.04 and 5.06, in effect, say that when you change the common stock by a stock split, then the holder of the debenture gets the right to the split stock. When you merge into another corporation, and the holder of common stock gets cash or securities on that merger, then the holder of the debenture gets the right to convert into what the holder of common stock before the merger got on the merger. So that the indenture provision provides for what is happening here. There is no supplemental indenture which is going to modify the rights that are provided there in 5.04 and 5.06.

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If the interventor were correct, the logic of his argument would be that in any merger -- let's assume a merger in which common stock of the surviving corporation is issued -- in any merger the holder of the debenture would have a veto power over that merger, and that clearly is not what the indenture provides; it could not be worked.

MR. ROME: With all due respect, sir, we are not intervenors.

THE COURT: I understand that he should have said objectors.

Mr. Rome, one final question. You have said that you think the attorneys for the plaintiffs here, that their representation shows that they are biased and somehow have not advocated their position adequately. What is your basis for saying that?

MR. ROME: No, sir.

THE COURT: Maybe I have misunderstood your position.

MR. ROME: My position is, sir, by reason of the fact that they are proponents of the settlement, they are therefore adverse to the position of those group of debenture holders who do not affirmatively assent.

THE COURT: In other words, you are saying that you do not agree with the settlement that is proposed and

therefore your position is somehow they are not doing their job?

MR. ROME: Sir, because I have several contract rights.

May I ask one more question to round out the record?

THE COURT: Yes.

MR. ROME: Would it kindly be explained for the record by the proponents of the settlement why there is a difference between the offer to pay $844.16 in cash for each convertible debenture, or $32.50 per share, times the conversion ratio to those who accept rather than $831.17 into which the debentures are convertible after the merger? That has not, so far as I understand, been explained of record. Would the Court kindly cause that to be done?

THE COURT: Yes.

MR. KLEIN: Your Honor, of course it is in the record. It is in my papers. The reason is that the settlement that we negotiated for the debenture holders was $844, if they want cash now. But because of the fact that it is a convertible debenture, and because the indenture contract rights are respected, the literal wording of the indenture provides for the debenture holder to get, in

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cash, the exact cash that the common stockholder got, not the more cash that the debenture holder could have gotten if he did not want to go along and retain his debenture.

So that the exact cash is $32 a share, which I think is $833.17. The offer to the debenture holder is a little more, which is $844, and that is the reason for the difference.

Your Honor, could I make just two or three more windup points? One with regard to the warrants.

As you know from our papers, the argument can and has been made that a warrant exercisable at $30 into a common stock at $32 is worth -- in quotes -- or entitled to -- in quotes -- only $2. And therefore leaving all other issues aside, what we did here -- and I explained in my papers the reason -- not only the $4, but we were prepared not to go through with the settlement unless we got $4, and the reason for that was this peculiar set of circumstances where the second tender offer involved a tender offer for the warrants, first at $2, then they increased it to $2.25, but the day before the second tender offer was made, the market price, I believe, was $4.75, and therefore we felt, bending backwards in terms of fairness, in our view, that the settlement price ought to be fairly close to that market price, and when you take

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into account the time period involved, and the fact that people have the use of the money and so on, $4 seemed to us to be very fair.

This settlement was not directed at a gentleman like the gentleman who was up here, you know, who bought and speculated.

It is not directed at Mr. Rome who bought $10,000 of his debentures apparently at the end of March or early in April, after he knew about the settlement.

It is not directed to speculator.

Secondly, with regard to business purpose, your Honor, I'd like to address myself to that because it takes two to tango, and there are two businesses involved.

Far more important, I have no concern with Thyssen's business purpose. I do not care about their merger. My interest is in all these security holders. There is a business purpose, an economic interest that mandates their getting out of this ninety per cent lock and freeze they are in and that seems to me to be extremely important.

Finally, there has been some confusion on this qustion of opt out, and as to exactly what we are talking about.

Your Honor, we are not operating under the

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security laws. We are operating under Rule 23, and Rule 23 has specific provisions with regard to notice, and this notice is far more than the Rule 23 notice. Also, it provides a remedy. It is a two-sided remedy. Either you can opt out and go exercise the same rights, bring the same complaint we did, or you can stay in, object, try to get better, but the worse can happen, you'll get what is in the settlement. If you do not feel about it too badly, you put in a fight, you take you $844 and run. You can't have it both ways.

Normally the objections are guys who are saying, "Factually, you are unfair, the terms are not fair, you did not give us enough money."

As I recall it, one of the cases we cited where Judge Gurfein disapproved the settlement because I think there was fifty-seven million dollars in give-ups involved in that case, and there had been no discovery.

You know, I think that, on the face of it, if I had been sitting there, I don't think I'd continue the hearing more than five minutes. Obviously you have to have more discovery.

But that is not the issue here. The issue here is a very refined almost exquisite legal question which, frankly, it is so exquisite I don't see it, but particularly when

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he is talking about the notice, your Honor, he is complaining that -- I don't point; there is no one else; he's the only one who has come in here with this position. We have case after case that has exercised under the same kind of provisions of this indenture where cash has been accepted. That doesn't mean that his interpretation is wrong. But it does mean that there is nothing derelict in my not having thought of this. Had I thought of this position, I would have rejected it, as I reject it here, because it is unfair, it is inequitable, and it does not recognize our economic system which gives a corporation a right to merge, which is part of the indenture contract. Thank you.

THE COURT: Mr. Klein, you said something about the business purpose from the standpoint of these people who are in this ninety per cent freeze-out, I guess is the way you put it. Could you explain to me what you mean by that?

MR. KLEIN: Yes. The convertible debentures bought, as I believe it, in 1968, and they bought a piece of paper in a company that gave them the benefit of a debt instrument with, at that time, I think, an interest rate of 5-1/4, 5-1/2, and a right to convert into common stock and participate in the equity and the growth of

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Indian Head. The common stock was listed on the New York Stock Exchange, the debentures were listed on the New York Stock Exchange, and the same thing, of course, is true with regard to the warrants and the same is true with regard to the common stock.

There is no law in this country that prevents one man from coming in or one corporation from coming in and acquiring control. And when that happened, and Thyssen acquired 90.6 per cent perfectly lawfully, the marketability of those securities -- it wasn't a transfusion; it was taking the blood out; it took the blood out of the securities, because the securities then became delisted.

Now there are companies, there are many companies, traded over the counter, possibly a few on the New York Stock Exchange, where there is a majority stockholder who owns 80 or 82 or 85 per cent. It can go on for years and no change.

But in this situation, where the majority stockholder had 90 per cent, as we point out in our papers, had they sent the notice which was the origin of our original complaint on the debentures, the debenture holder would have gotten $701. The day after they got the 90 per cent, the market -- and it was practically no market -- as I

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recall it, was $425 and/or $42.50 per hundred. This is what we are talking about.

So the market got to be paralyzed, but then -- it reminds me of kosher slaughter, which is not the knife in the throat, but they hit the cattle on the head and knock them senseless -- came this merger. When they announced the merger and then withdraw the merger, there were these securities hanging in suspenso, and there was no chance for them then, and what I am saying is this settlement, the business purpose of this settlement is, it freezes those securities at what we think is a very fair price, but it gets less fair every day, your Honor, every day that you are locked in and you don't actually have the benefit of the money, which is why we hope that there will be expedited approval of the settlement.

Thank you.

THE COURT: All right.

MR. ROME: Your Honor, may I say just one final word?

THE COURT: Yes.

MR. ROME: Even Homer nodded. The allegations by Mr. Klein that the last purchase by the Sally Rome Trust was after the merger announcement in February is simply false.

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The purchase was made on 12/23/75, as the evidence of Neuberger & Company in Philadelphia will attest, but it took between December 23, '75 and April of '76 to have the last 10,000 recorded.

And finally, the very statement that the convertible debenture offer was 844.16 clearly establishes that that was an offer to purchase and therefore a tender offer within the meaning of the Williams Act.

Thank you, sir.

THE COURT: All right. I do have one more question. Mr. Sklaver, if I remember correctly, there was a point in time when you were not going to participate in the settlement because of a conflict. Obviously that conflict has been resolved. Can you explain that situation to me?

MR. SKLAVER: Your Honor, there has never been a conflict. At one point Shamrock was wondering whether it had a wholly unrelated claim, based upon alleged conversations before -- I guess it was after the first tender offer.

THE COURT: Shamrock was a warrant holder.

MR. SKLAVER: A warrant holder. We have indicated to Shamrock that there is absolutely no merit to that situation. The reason that we were possibly not going

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to join in this settlement, your Honor, and the reason that we came in at the tail end was because it took us that additional time to conduct our own investigation and determine for ourselves the fairness of the settlement.

The settlement worked in various stages. There was a one point a basic settlement which, for example, would have been res judicata on the rights of the tendering shareholders who are getting nothing out of this settlement. They were brought into the complaint, into the initial complaint.

We felt that we could not prove a case, approve damages, certainly, for those people. They are being dropped out of the settlement.

Now, the original settlement was to be one in which the issues were to be res judicata on everyone. It occurred to me that I had had a case before Judge Bonsal in which a certain class was not to receive anything, and since they were not to receive anything, and it was not a determination on the merits, it would not be proper for us to give away their rights, to make it res judicata on that group. So that issue arose.

I had conversations with Mr. Blanc's office on that. That delayed it part of the time. Until we had

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gotten our experts' report and discussed the report with Shamrock, that took a while.

I recall that when you had referred the matter to Magistrate Schreiber, at the time of the second meeting that we had with him -- I wasn't at the first -- we still had not gotten Shamrock's agreement to the settlement because we had just prior to that gotten the report.

Well, at that time the original settlement had already been made. The original papers had already been filed and you had referred the matter.

Between the second and the third conferences with Magistrate Schreiber, we evaluated the report. Shamrock went along with the settlement. We then appeared before Magistrate Schreiber and indicated that we were joining in the settlement and that Shamrock was agreeable to it. And that is why the stipulations came in.

THE COURT: All right.

Now, gentlemen, are you getting daily copy of the transcript? Is anybody?

MR. BLANC: Yes, your Honor.

THE COURT: All I am concerned about is whether I can get a copy fairly soon.

MR. BLANC: We will be happy to provide it to your Honor as soon as it is available.

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THE COURT: Of the hearing last week and today. I'd appreciate that very much.

Thank you very much, gentlemen, for all your time. You have helped me very much.

MR. SKLAVER: One question. You earlier indicated that you wanted something on 3(a)10. I assume you don't want it?

THE COURT: I don't think I need it now.

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I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

John H. Kruppel

Official Court Reporter
U. S. District Court

MEMORANDUM OPINION #45364 (Filed November 16, 1976)
UNITED STATES DISTRICT COURT (pp. 352a-392a)
SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER and DANIEL R. KAPLAN, as Trustees under the Trust Agreement dated November 15, 1968, made by WILTRUD E. GADBOYS, as Grantor, CECIL G. HUSKEY, W. T. STRATTON and NORTE & CO., a partnership composed of JOSEPH C. GALDI and RITA D. GALDI,

Plaintiffs,

-against-

THYSSEN-BORNEMISZA EUROPE N.V., THYSSEN-BORNEMISZA, INC., THYSSEN-BORNEMISZA HOLDINGS, INC., MARINE MIDLAND BANK, INDIAN HEAD, INC., JAMES G. FERGUSON, JAMES M . FLACK, ANDREW KALMAN, PAUL W. McALISTER, JOHN E. O'SULLIVAN, RICHARD J. POWERS, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, HERBERT E. BACHRACH, GERARD B. HUISKAMP, WHITE, WELD & CO., INCORPORATED, L. EMERY KATZENBACH, H. H. THYSSEN-BORNEMISZA, R. L. GENILLARD and CHEMICAL BANK,

Defendants.

74 Civ. 5755

CES

#45364

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
NOV 16 10 01 AM '76

WILLIAM B. WEINBERGER,

Plaintiff,

-against-

RICHARD J. POWERS, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALLISTER, JOHN E. O'SULLIVAN, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, JAMES G. FERGUSON, THYSSEN-BORNEMISZA, INC. and INDIAN HEAD, INC.,

Defendants.

75 Civ. 229

MICROFILM
NOV 16 1976

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76-7578

SHAMROCK CORPORATION, individually and on behalf of all holders of Common Stock and Warrants of Indian Head, Inc., similarly situated, Plaintiffs, -against- INDIAN HEAD, INC., THYSSEN-BORNEMISZA GROUP N.V., THYSSEN-BORNEMISZA, INC., WHITE, WELD & CO. INCORPORATED, et. al., Defendants.	75 Civ. 1736

M E M O R A N D U M

STEWART, DISTRICT JUDGE:

Before the Court is an application pursuant to Rule 23 of the Federal Rules of Civil Procedure for approval of a proposed settlement. Counsel for both plaintiffs and defendants have submitted well documented papers in support of the proposed settlement. Objectors have presented papers in response, and have been heard at hearings before this Court on October 13 and 18, 1976. Upon a detailed review of the arguments and documents submitted by all parties, it is the Court's conclusion that the settlement is fair and reasonable and should be approved.

Indian Head is a diversified American company which in 1973 had approximately 5,425,000 shares of common stock outstanding.[1/]

1/ It also had 649,000 shares reserved for issuance to the convertible debenture holders pursuant to their conversion rights, and 111,667 shares reserved for the conversion of preferred shares.

The common stock was listed on the New York Stock Exchange. Warrants were issued and outstanding pursuant to a 1965 agreement, and were listed on the American Stock Exchange.[1A/] $25,000,000 of 5-1/2% convertible subordinated debentures due April 15, 1993, (in denominations of $1,000) were also issued and outstanding subject to the terms and conditions of an Indenture dated April 15, 1968, between Indian Head and Marine Midland Grace and Trust Company of New York as Trustees ["Indenture"].

Thyssen-Bornemisza Europe, N.V. ["TBE"] is an international industrial holding company with headquarters in the Netherlands. In September, 1973, pursuant to a Memorandum of Understanding between TBE and Indian Head,[2/] TBE made a tender offer at $27 a share, and acquired approximately 33.9% of the common stock,[3/] although initially it had offered to buy only between 26% and 32%.

2/ Indian Head agreed in the Memorandum of Understanding to 1) sell TBE 750,000 shares of Indian Head's authorized but unissued common stock at $27 per share; 2) cooperate with TBE in the first tender offer; 3) elect to the Indian Head Board of Directors Huiskamp (Chairman of TBE's Board of Management) and Bachrach (a member of TBE's Board of Management and director of its Corporate Planning and Development), and to make one a member of the Executive Committee and one a member of the Finance Committee. TBE agreed to buy from the Directors of Indian Head up to 50,000 of their shares, and to name Robison (Indian Head's former president) to the TBE Supervisory Board (which makes TBE policy), if the tender offer succeeded.

3/ TBE's initial offer was to purchase from the public between 750,000 and 1,100,000 shares of common stock, in addition to 750,000 to be purchased directly from Indian Head's authorized but unissued stock. This would have given them 26% to 32% of the stock. At the expiration of the offer 1,213,619 shares had been tendered, and although this was slightly in excess of the number of shares TBE sought, TBE states that it agreed to purchase all shares tendered in order not to disappoint the tendering stockholders (Defendants' Joint Memorandum in Support of Proposed Settlement, p.3) ["Defendants' Memorandum in Support"].

1A/ "Each Warrant is issued pursuant to the Warrant Agreement with the Chemical Bank of New York as Warrant Agent ("CHEMICAL"), and entitles the holders through May 15, 1990 to purchase one share of common stock, or an aggregate of 400,000 shares, at the following exercise prices: $20 per share if exercised before the close of business on May 15, 1970; $25 per share to May 15, 1975; $30 per share to May 15, 1980; $35 per share to May 15, 1985; and $40 per share to May 14, 1990;" Plaintiffs' affidavit p. 23.

Prior to the tender offer, the New York Stock Exchange had indicated to Indian Head and TBE that ownership by TBE of over 32% would probably result in delisting the common stock. This information was included in the statutory notice to shareholders.[4/] In paragraph 9 of this same notice to shareholders, TBE disclaimed any present intention to acquire control of Indian Head.

> Except to the extent described above, it is not the present intention of TBE to attempt to acquire control of Indian Head by means of these transactions, nor in its capacity as a major stockholder of Indian Head does TBE now have or intend to develop plans or proposals to liquidate Indian Head, to sell its assets or to merge it with any other person or to make any change in its business, management or corporate structure. TBE does intend to vote its shares in a manner which is intended to benefit all of the stockholders of Indian Head, including TBE. (Plaintiffs' Exhibit 24)

Indian Head's management made no recommendation to its shareholders with respect to this first tender offer--though it did state in the notice that it cooperated with TBE in making the offer (it made available a list of shareholders).

No notice of this first tender offer or of the possible delisting of the common stock was sent to the debenture holders,

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4/ "...if the ownership by TBG (later changed to TBE) of Indian Head common stock should arise above 32% (30%, if 30% or less is purchased pursuant to this offer and the agreement referred to above) such additional ownership might ultimately result in the delisting of Indian Head common stock from the Exchange. TBG has expressed to Indian Head its commitment that it will consult with Indian Head before taking any action, other than the transactions described in this offer, which would increase TBG's ownership of Indian Head common stock beyond 30% of the outstanding shares. Delisting could also result if the number of persons holding at least 100 shares of Indian Head common stock (approximately 4,000 at the present time) should fall below 1,200." (Plaintiffs' Exhibits in support of settlement, Exhibit 24, ¶13) ["Plaintiffs' Exhibits"].

warrant holders or preferred share holders. However, the 1973 Annual Report did refer to the tender offer and the resulting acquisition of the stock.

In July, 1974, TBE made a second tender offer to buy all remaining Indian Head common stock, (again at $27 a share), and all outstanding warrants at $2.25 per warrant. This second tender offer was financed by a $50,000,000 long-term revolving credit agreement with the Chase Manhattan Bank, N.A. and fourteen other banks located outside the United States. Plaintiffs claim that these financial arrangements were made just nine weeks after the first tender offer (although the second tender offer was not to take place for 7 more months), and thus supports an inference that TBE's statement in its first tender offer that it did not intend to liquidate Indian Head, sell it, or merge it, was false and misleading. The defendants dispute this claim.

The notice to shareholders of the second tender offer disclosed, among other things: the financing arrangements for the offer (Plaintiffs' Exhibit 45, ¶11); the fact that Indian Head's Board of Directors and management made no recommendation, although they had cooperated with TBG (later changed to TBE) (Id. ¶12); the number of shares each member of the Indian Head Board was going to tender or retain (Id.); the fact that as a result of the 1974 tender offer the common stock might no longer meet the requirements of the New York Stock Exchange for continued listing and the Exchange might delist the shares (Id. ¶13); that TBG intended to acquire control of Indian Head, but did not have any present plans to sell its assets or merge. The notice also stated:

> TBG expects to purchase a substantial majority of the common stock as a result of this offer and thereby acquire control of the Company. TBG believes the Company to be well managed and to present an attractive long-term investment opportunity. TBG presently does not have any plans or proposals to make any major changes in the Board of Directors, management, corporate structure, operating policies or business of the Company or to suggest its liquidation, the sale of its assets or a merger with any other person. However, it reserves the right to make changes in the future should it determine that the best interests of the Company and its stockholders are served thereby. (Id. ¶9).

No copy of this notice was sent to the registered convertible debenture owners.

As a result of this second tender offer, TBE's total ownership of common stock increased to approximately 90.6%. They also obtained about 8% of the outstanding warrants. Shortly after the tender offer, the New York Stock Exchange delisted Indian Head's common stock and convertible debentures, and thereafter they were traded over the counter.

The three class action lawsuits involved in this settlement were brought, as a result of these two tender offers, against TBE, Indian Head, TBI,[5/] Marine Midland, Trustee for the Debentures, Chemical Bank, warrant agent, White, Weld & Co., Inc., Indian Head's investment advisor, and various individual defendants

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5/ A Maryland corporation which is a wholly-owned subsidiary of TBE, formed for the express purpose of acquiring Indian Head's stock and warrants.

who are or were officers and directors of Indian Head.[6] The Complaints in all three actions alleged violations of the Williams Act §14(d) and (e)[7] and §10b of the Securities Act of 1934[8] and Rule 10b-5 promulgated thereunder. The convertible debenture owners claim that the failure to send them notice was a violation of the Act and that this prevented them from favorably exercising their conversion rights. They also claim that TBE's acquisition of control constituted a constructive merger in violation of the Indenture. The warrant owners claim the tender offers were false and misleading. Both the Brucker and Shamrock Complaints also allege a common law breach of fiduciary obligations.

The defendants moved either for dismissal of the Complaints or for summary judgment, and the plaintiffs cross-moved for summary judgment. These motions were sub judice on February 12, 1976, when TBE announced a proposed "short-form" merger[9] of Indian Head into a TBE affiliate which was to take place on March 19, 1976.[10]

6/ Edward Brucker, et. al. v. Thyssen-Bornemisza Europe, N.V., et. al., 74 Civ. 5755 ["Brucker"] and William Weinberger v. Powers, et.al., 75 Civ. 229 ["Weinberger"] were originally brought on behalf of convertible debenture owners of Indian Head. Shamrock Corporation v. Indian Head, et. al., 75 Civ. 1736 ["Shamrock"] was brought on behalf of all holders of common stock and warrants of Indian Head.

7/ 15 U.S.C. 78n et seq.

8/ 15 U.S.C. 78j(b).

9/ Under §253 of the Delaware Corporation Law.

10/ Under the proposed merger, the common shareholders would be paid $30 cash per share (compared to the $27 price of the tender offers), the convertible debentures could be surrendered for $779.22 cash, the conversion value at $30 per share (compared to the $701.30 tender offer conversion value) or held until maturity earning the regular interest payments but without the right to convert. The warrant owners were to receive nothing.

The Brucker plaintiffs moved to enjoin the merger through an amended class action complaint,[11/] which was filed on behalf of all owners of warrants and common stock, as well as the debenture holders previously represented. On March 4, at the opening of the preliminary injunction hearing, the defendants announced that they were withdrawing the merger plan.

Subsequent to the announcement of the proposed merger, but prior to its withdrawal, the Court of Appeals for the Second Circuit issued opinions in Marshel v. AWF Fabric, 533 F.2d 1277, (2d Cir.), vacated, 45 U.S.L.W. 3272 (Oct. 12, 1976), and Green v. Santa Fe Industries, Inc., 533 F.2d 1283 (2d Cir.), cert. granted, 45 U.S.L.W. 3220 (Oct. 5, 1976), which considerably changed the law as to short-form mergers, and left many questions for future litigation. This uncertainty in the law led defendants to withdraw their merger proposal, and to negotiate with the plaintiffs, Transcript, First Settlement Hearing on October 13, 1976, at 22 ["1st Tr."].

A Stipulation and Agreement of Settlement was reached and signed by all the parties in late July. The Court then ordered, among other things, that the three actions should be maintained as class actions for purposes of settlement only, that a settlement hearing be held on October 13, and that a notice of this hearing and of the settlement terms be sent to all

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11/ The amended complaint claimed that the merger plan constituted a redemption, and thus the debenture holders were entitled to $1,033, the redemption price, rather than the conversion price of $779.22.

the members of the various classes, so that those who wanted to be excluded could opt out, and those who wanted to object could do so.

Two objectors appeared at the settlement hearings, Morton P. and Marjorie T. Rome, trustees of a trust which owns 25 debentures, and Morris Shuldenrein,[12/] owner of 7,500 warrants. Since most of the Romes' objections go to the scope of the settlement, and not its actual terms, we will defer discussion of their objections for the moment, and first discuss the fairness of the actual terms of the settlement.

The settlement agreement provides for the merger of Indian Head into a subsidiary of Thyssen-Bornemisza, Inc., ["TBI"]. Under the terms of the 32 million dollar settlement, the common stockholders will receive $32 a share upon the merger. The owners of the 5-1/2% convertible subordinated debentures due in 1993,[13/] have a number of options: 1) hold on to the debentures and collect the interest until 1993, at which time they can collect the $1000, 2) convert now at $32.50 a share, and receive $844.16 per $1000 debenture,[14/] or 3) convert any time between the merger and 1993 and receive $32 per share (or $831.17 per $1000 debenture), a

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12/ Although Mr. Shuldenrein did not properly file his objection, the Court heard his statement, and has considered his objection.

13/ The convertible debentures are issued in face amounts of $1000 or integral multiples thereof, and are convertible into 25.974 shares of common stock per $1000 in principle amount.

14/ This applies only to debenture owners who were owners on August 2, 1976 and who still own on the date of the merger.

fixed cash sum.[15/] In addition, former owners of Indian Head convertible debentures who held them on September 27, 1973,[16/] and sold on or before July 1, 1974,[17/] will receive up to $50 per debenture. Former owners of debentures who held them on July 2, 1974 and sold between July 12, 1974[18/] and August 2, 1976,[19/] will receive up to $100 per debenture, the exact amount determined by the sales price.

As to the warrant holders, those who have owned warrants continuously from July 12, 1974 to the date of the merger will receive $4.00 per warrant. As to the warrant holders who have not owned their warrants continuously: owners on August 2, 1976, who still own on the date of the merger will receive $2.50 per warrant; owners of warrants on July 2, 1974, who sold their warrants between July 12, 1974, and August 2, 1976, will receive $1.50 per warrant. There will be no payment for any warrant

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15/ As is apparent, those debenture holders who convert as part of the settlement will receive $.50 more per share than those who convert later. The difference is due to the fact that the Indenture requires the debenture holder to receive what the common stockholders receive (here, $32 a share) in the case of a merger. Transcript, Second Settlement Hearing on October 18, 1976, p. 68 ["2d Tr."].

16/ Date of the first tender offer.

17/ On July 1, 1974, Indian Head requested suspension of trading of its stock. Trading was suspended from July 2 until July 12, 1974.

18/ July 12, 1974, was the date of the second tender offer.

19/ August 2, 1976, is the date the Order in the instant case was signed.

sold between August 1, 1973, and July 1, 1974. In addition to the above amounts, TBI will pay all the expenses of administering the settlement and will pay up to $600,000 for counsel fees and expenses as awarded by the Court. Plaintiffs' attorneys agree to accept an award not to exceed $600,000.

The general principles which guide the Court in assessing the fairness, reasonableness and adequacy of a class action settlement are clear.

> ...the role of a court in passing upon the propriety of the settlement of a...class action is a delicate one...since '[t]he very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation,' the court must not turn the settlement hearing 'into a trial or a rehearsal of the trial.' Rather...it must reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and 'form an educated estimate of the complexity, expense, and likely duration of such litigation...and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.' Newman v. Stein, 464 F.2d 689, 691-92 (2d Cir.), cert. den., 409 U.S. 1039 (1972); (citations omitted).

Levin v. Mississippi River Corp., 59 F.R.D. 353, 361 (S.D.N.Y. 1973). Some of the factors considered "relevant to a full and fair assessment" of the proposed settlement by the District Court, and approved by the Court of Appeals in City of Detroit v. Grinnell Corporation, 495 F.2d 448, 463 (2d Cir. 1972), were: 1) the complexity, expense and likely duration of the litigation; 2) the reaction of the class to the settlement; 3) the stage of the proceedings and the amount of the discovery completed; 4) the risks of establishing liability; 5) the risks of establishing damages; 6) the risks of maintaining the class action through the trial; 7) the ability of the defendants to withstand a greater

judgment; 8) the range of reasonableness of the settlement fund in light of the best possible recovery; 9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. At the heart of the analysis the Court must evaluate the strength of the plaintiffs' case, considering both the likelihood of establishing liability and the consequent probable reward in damages. It must consider these factors in light of the terms of the settlement.

In the instant case, there are complicated questions of law on both the issues of liability and damages. While the role of a Court in determining the fairness of a settlement is not to decide these issues, the Court should, and here does, take note of the fact that these complex questions of law are unresolved, thus making this case an appropriate one for settlement. One of the primary unresolved legal questions involves the interpretation and application of Marshel, supra, Green, supra, and Merrit v. Libby, McNeill and Libby, 533 F.2d 1310 (2d Cir. 1976) to the attempted short-form merger in this case, particularly in light of the fact that the Indian Head merger is distinguishable on its facts from each of the above cases. Thus the Court does not agree with the objectors' assertion that liability is clear with respect to issues arising from the short-form merger. This case also presents complex legal and factual questions on a variety of other issues, among them: whether or not the 1973 and 1974 tender offers were false and misleading in failing to disclose that TBE would merge Indian Head into an affiliate; whether or not under Van Gemert v. Boeing, 520 F.2d 1373 (2d Cir.),

cert. den., 423 U.S. 947 (1975), Indian Head was obligated to send notice of the tender offers to the registered debenture owners.

In determining the reasonableness of the amount of the settlement in relation to the amount of a possible recovery after trial, the Court has considered the expert opinions submitted to the Court by Martin Whitman of M. J. Whitman & Co., and Robert Winston, of Winston Perry Financial Corporation, the evaluation by counsel, and the cost of litigating the aforementioned legal issues. The Court has also noted the favorable reaction of the classes to the settlement.[20/] In light of these factors, we find the settlement fair and reasonable.[21/]

20/ The plaintiff wrote in his affidavit in support of the proposed settlement, that:

> Out of $14,295,000 convertible debentures, the owners of $1,240,000 communicated with us. The owners of $1,212,000 (including L.F. Rothschild & Co.) indicated acceptance, the owners of $27,000 opted out (not including $25,000 of the Rome objectants referred to hereafter). The owner of $1,000 said she would not sell a $1,000 bond for $844.16. [The acceptance of an additional $172,000 was noted at the hearing, 1st Tr. at 18.]
>
> Out of 585,386 shares of publicly held common stock, the owners of 4,851 shares communicated with us, with the owners of 701 shares indicating acceptance, the owners of 3,271 shares opting out, and one owner of 1,050 shares objecting.
>
> Out of 349,467 publicly held warrants, the owners of 9,070 communicated with us, all of whom indicated acceptance. [Plaintiff's affidavit at 9-10].

21/ Thus we find no merit in Mr. Shuldenrein's claim.

The Romes raise a number of objections to the proposed settlement; most of them going to the scope of the settlement, and not the fairness of its terms. First they object to the designation of the suits as class actions for purposes of settlement only, on the grounds that this is unauthorized by Rule 23 and is violative of the provisions of the Manual for Complex Litigation, which advises against "a tentative determination of a class action request for the purpose of settlement."[22/] The Second Circuit has stated in Grinnell, supra, that the Manual recommendations "were not meant to be intractable rules," and that the major concern of the Manual may be satisfied where, as here, the settlement provides "for notice of a hearing and an opportunity to challenge the fairness or any other aspect of the proposed settlement," Grinnell, 495 F.2d at 466. In addition, Grinnell stated that the Manual's objectives may be satisfied where, as here, the settlement was not negotiated in the early stages of the dispute, but rather after the parties had engaged in considerable litigation and were able to assess the risks of success, and where, as here, there were not different counsel vying to be class representatives before the settlement agreement was reached and publicized, thus not presenting a situation such as in Ace Heating and Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971). Therefore, the designation of these actions as class actions for purposes of settlement only was proper in this case.

22/ Manual for Complex Litigation §1.40 (1975).

The objectors also claim that there is an abuse of the use of Rule 23 as it is applied in this case to the convertible debenture holders. They note that the Rules Enabling Act[23/] under which the Federal Rules of Civil Procedure were promulgated, specifically provided that the Rules should not abridge or modify any substantive rights. The abuse to which the objectors point is the proposed settlement, which they contend will abridge the substantive conversion rights of the debenture holders. We do not agree that the settlement abridges any substantive rights of the debenture holders (see pp. 16-18 infra). Further, we find that the Rule 23 procedures were properly followed. Full notice was given to all members of the classes, and their rights to appear and object, or to opt out, were fully explained. Thus the Rule 23 procedures have protected the substantive rights of the individual debenture holders.

The Romes also challenge the adequacy of the notice of the proposed settlement. The notice complied with 23(c)(2) and clearly advised the class members of the nature of the pending action and the general terms of the settlement, and indicated where more detailed information was obtainable and where objections could be heard. All material facts were included.

Many of the Romes' objections arise out of an assertion that the Indenture prevents any class action settlement involving debenture owners, as the Court can in no way alter "...the creditors [debenture holders]...separate and several contract

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23/ 28 U.S.C. 2074, as amended November 6, 1966, Pub. L. 89-773, §1, 80 Stat. 1323.

rights..."[24] without the individual written consent of each holder. They claim that the settlement can only bind those holders who affirmatively opt in and cannot bind those who do not respond. They also claim that the Indenture agreement prevents a forced conversion into money in the event of a merger, and requires either that Indian Head redeem the debentures[25] or that Indian Head respect the absolute right to convert into common stock.

An analysis of these arguments requires an interpretation of the Indenture agreement, particularly Sections 5.06, 12.02, 13.01, and 13.02 (Articles 5, 12 and 13 of the Indenture are set out in Appendix A). Objectors argue that §12.02, which provides for approval by two-thirds of the outstanding debentures when the issuer wishes to change or modify the Indenture itself, and requires consent of each debenture holder when the right to convert is altered or impaired, should be interpreted in this case to require the written consent of each debenture holder, since an attempt is being made to alter or impair the conversion right (2d Tr. at 6-10).

The plaintiffs and defendants argue in response that the voting requirements of §12.02 do not apply in the case of a merger. Rather, they state that §5.06, §13.01 and §13.02

24/ Reply Brief of Objectors, p. 3.

25/ At the current redemption price of $1,033 (103.30%).

(which do not call for individual consent or a two-thirds vote) should govern the merger,[26/] since these sections specifically discuss what is to occur in case of a merger (Defendants' Memorandum in Response to Objectors' Brief at 20; 2d Tr. at 2-10). §5.06 provides that:

> In case of any...merger into another corporation... such successor...shall execute and deliver to the Trustee a supplemental indenture...providing that the holder of each debenture then outstanding shall have the right thereafter to convert such debenture into the kind and amount of shares of stock and other securities and property receivable upon such... merger...by a holder of the number of shares of common stock of the company into which such debenture might have been converted immediately prior to such... merger....

First, we agree that §5.06 should control here because it contains a detailed and specific provision as to what the debenture holders' rights are in a merger while §12.02 deals with their rights in a general context.

In the case of a merger, §5.06 requires that the supplemental Indenture contain the right to convert into whatever form of property the shareholders receive in the merger. Thus the debenture holders have never had an absolute right to convert into Indian Head stock in a merger, but only the right to convert

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26/ The debenture holders were alerted to the applicability of these sections by the debenture itself, which stated that "...the holder...has the right...to convert this debenture into fully paid and non-assessable shares of Common Stock of the Company...subject to such adjustment, if any, of the conversion rate and the securities or other property issuable upon conversion as may be required by the provisions of the Indenture."

into whatever form of "property" the shareholders would receive. Defendants argue that cash is "property" within the meaning of §5.06. We agree that cash is within the scope of the term "property" as used in §5.06, and note that it has been so interpreted in Broenen v. Beaunit, 440 F.2d 1244 (7th Cir. 1970). Here, as a result of the proposed merger, the Indian Head shareholders will receive only cash for their stock. Thus the provision in the settlement agreement allowing for conversion of the debentures into cash only is proper under §5.06 because this is all the shareholders are receiving. In addition, §5.06 does not require the individual written consent of each debenture holder when conversion rights are altered pursuant to a merger, so we conclude that the settlement abridges no rights of the debenture holders and can properly bind all debenture holders who do not opt out.

Since we find that no substantive rights of the debenture holders are abridged by this settlement, this dispenses with the following objectors' claims: 1) that representation of the class was not adequate since class representatives cannot assert rights running individually and severally to each holder (Objectors' Brief in Support of Objections to Proposed Settlement at 15-16, 23-25); 2) that their constitutional rights under the Fifth and Fourteenth Amendments and Article One, Section 10 were violated (Id. at 16-17); 3) that the class is not sufficiently numerous, since not a sufficient number assented in writing (Id. at 23); and 4) that the settlement violates rights of all non-assenting convertible debenture owners under Delaware law (Id. at 40),

New York law (Id. at 41), and Pennsylvania law (Id. at 43).

The Rome objectors also claim that the settlement agreement violates various sections of the Securities Act of 1933, 15 U.S.C. §77a et seq. ["1933 Act"], the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq. ["1934 Act"], and the Trust Indenture Act of 1939, 15 U.S.C. §77aaa et seq.

Objectors claim that §5(c) of the 1933 Act[27/] has been violated since the proposed settlement and notice of settlement is an "offer to sell" as well as an "offer to buy" securities, and as such the parties have not complied with the registration requirements of the Act. The settlement agreement is clearly not an offer by TBE to sell a security. While the settlement may be interpreted to encompass an "offer to buy," we find that the registration requirements of §5(c) were not meant to apply to offers of an issuer or controlling stockholder of an issuer, to acquire for cash the issuer's outstanding securities.

> When the issuer itself is making an offer to buy its own securities--at least when the offer goes to a substantial number of security holders--§5(c) would seem literally to apply in the sense that there is no specific exemption or exclusion; for that is an offer (and hence a transaction) "by an issuer." On the other hand, however tempting it might have been before the special legislation of 1968 to reenforce Rule 10b-5 under the 1934 Act by using §5(c) to attack the problems of inadequate disclosure by issuers in public tender offers...not merely the legislative history of §5(c) but the whole registration structure of the 1933 Act is utterly inconsistent with any concept of issuers registering public offerings to buy as distinct from public offerings to sell. 4 Loss, Securities Regulation 2317-8 (Supplement to 2d Ed., 1969).

27/ 15 U.S.C. §77e.

Rather, Loss found that the provision "was originally inserted solely for the purpose of preventing dealers from making offers to buy from underwriters during the waiting period." 1 Loss, Securities Regulation 212 (2d. Ed., 1961).

Even if the requirements of §5(c) were held to apply to offers by an issuer to buy its own stock, plaintiffs and defendants claim that §3(a)(10) [28/] would exempt the settlement from the registration requirements. [29/] Section 3(a)(10) states:

> Sec. 3(a) Except as hereinafter expressly provided the provisions of this title shall not apply to the following classes of securities:
>
> * * *
>
> (10) Any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval....

According to the objectors, the Supplemental Indenture with modified conversion rights which will be issued as a consequence of the settlement to debenture holders who do not convert, is a "security" within the meaning of §5(c).

28/ 15 U.S.C. §77c(a)(10).

29/ 3(a)(10) has been applied to judicially approved settlements, see LIN Broadcasting Corp. [1972-73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,154 at 82,512; VTR Inc. [1971-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,518 at 81,117.

(Objectors' Brief at 31). They contend, therefore, that the provisions of §5(c) are applicable. If so, it would seem to follow that §3(a)(10) would also apply to exempt the transaction, since there would be an issuance of a security (Supplemental Indenture) in exchange for "bona fide outstanding securities" (the Indenture).[30/] The objectors argue further, nevertheless, that there is no exemption because the required judicial hearing was held after the issuance of the security, not before (2d Tr. at 32-34).

This view is predicated on the assumption that the notice of settlement was an issuance of a security. The Court does not hold that view because the terms of the settlement do not become effective until approved by the Court. The hearing

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30/ Because the issuance of the Supplemental Indenture is not a specific term of the settlement, but is activated by the terms of the prior Indenture (which require such a Supplemental Indenture in the case of a merger), it could be argued that the settlement itself is purely a cash exchange, whereby TBE is issuing cash only for Indian Head securities. While under this view §3(a)(10) would seem not to be directly on point (since no security is being issued), it might be held to be applicable in light of the purpose of the registration sections. The purpose of requiring registration is to place the facts before the public, and to protect against fraud and misrepresentation, 1 Loss, Securities Regulation 178-181 (2d. Ed., 1961). Section 3(a)(10) provides an exception to this requirement where the facts have been disclosed and the fairness of the terms and conditions have been passed on by a Court. While this section only applies when securities are issued, the same policy considerations would seem to apply to transactions where cash only is being offered in exchange for an outstanding security. Thus an exemption from §5(c) should be allowed for offers to buy outstanding securities with cash which have been judicially approved after a hearing.

on the fairness of the terms and conditions of the settlement at which all persons affected had an opportunity to appear and be heard, was held on October 13 and 18, 1976. Thus the hearing fully complied with the requirements of §3(a)(10).

The objectors also claim the class notice omitted certain material facts[31/] in violation of §17(a) of the 1933 Act, and sections 10(b) and 14(e) of the 1934 Act. We find the notice in this case more than adequate, and that these sections have not been violated. Since we also have concluded that no terms or rights under the Indenture are violated by the settlement, [see pp. 15-18 supra], no action will lie under the Trust Indenture Act.

In addition, the objectors claim that the notice of settlement violates sections 13(d), 13(e), 14(d), and 14(e) of the 1934 Act[32/] and the Rules promulgated under these sections. They claim that the notice constitutes a "tender offer," and as such the defendants have failed to comply with the filing requirements of the Act. While the settlement agreement does contemplate what might technically be described as a tender offer,[33/] we think that these sections were not meant to apply to judicially approved settlement agreements, particularly in light of the legislative history.

31/ Objectors' Brief at 25 and 32 .

32/ 15 U.S.C. §78m et seq. and §78n et seq., passed in 1968 and commonly known as the "Williams Act."

33/ The term "tender offer" is not defined in the statute, regulations, or legislative history. Thus Courts have found that they have latitude to apply the provisions of §14 in light of the factual context. Nachman Corporation v. Halfred, Inc., [1973-74 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,445 at 95,589, 590 (N.D. Ill., 1973).

> Congress' principal concern was to assure the shareholder substantial timely disclosure... Congress determined that the shareholder should have the 'relevant facts' so he can make an informed decision on whether to sell his holdings or to maintain his investment in a company that might be changing hands and undergoing significant transformation. Note, 86 Harv. L. Rev. 1250, 1256 (1973).

As noted by the Seventh Circuit:

> ...the overriding purpose of Congress in enacting this legislation was to protect the individual investor when substantial shareholders or management undertake to acquire shares in a corporation for the purpose of solidifying their own position in a contest over how or by whom the corporation should be managed. In the words of Senator Williams: '[The bill] is designed solely to require full and fair disclosure for the benefit of investors'...Bath Industries, Inc. v. Blot, 427 F.2d 97, 109 (7th Cir. 1970). See also Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 945 (2d Cir. 1969); 113 Cong. Rec. 24664 (1967).

That the purpose was to protect the individual investor can also be seen from looking at what the Act requires to be disclosed. It requires disclosure of, among other things, the identity and background of the person or group making the tender offer; the size of the holdings of the person or group; the source of funds to be used and the financing arrangements for these funds; the purpose of the tender offer, and the plans of the offeror (to liquidate, sell, merge, etc.); and the price, terms, and conditions of the offer.

We find that the individual investors have been more than adequately protected by the procedures followed in the instant judicially-approved settlement, where the individual investor has had full notification of the terms of the offer, the people or groups involved, the purpose of the offer and

the plans of the offeror. Thus we conclude that the filing requirement of the Williams Act does not preclude this settlement.[34/]

Accordingly, the Court concludes that the settlement is fair and reasonable, and should be approved.

SO ORDERED.

United States District Judge

DATED: New York, New York
November 15, 1976.

34/ In addition, 14(d)(8)(b) provides that there is an exemption from the filing requirements of 14(d) for "any offer for or request or invitation for tenders of any security...by the issuer of such security."

APPENDIX A

ARTICLE FIVE

Conversion of Debentures

Section 5.01. The holder of any Debenture or Debentures shall have the right at any time prior to maturity, at his option, to convert, subject to the terms and provisions of this Article Five, the principal amount of any such Debenture or Debentures (or any portion of the principal amount thereof which is an integral multiple of $1000) into fully paid and non-assessable shares of Common Stock at the conversion rate of 25.974 shares of Common Stock for each $1,000 principal amount of Debentures, subject in each case to any adjustments in such conversion rate pursuant to the provisions of Section 5.04 (except that with respect to any Debenture or Debentures which shall be called for redemption such right shall terminate at the close of business on the second business day next preceding the date fixed for redemption of such Debenture or Debentures, unless the Company shall default in payment due upon redemption thereof), upon surrender of the Debenture or Debentures, the principal of which is so to be converted, to the Company at any time during usual business hours at the office or agency to be maintained by it in accordance with the provisions of Section 6.02, and, if so required by the Company, accompanied by a written instrument or instruments of transfer in form satisfactory to the Company and the Trustee duly executed by the holder or his duly authorized agent or legal representative. Prior to delivery of any certificate or certificates representing shares of Common Stock into which the principal of such Debenture or Debentures is so to be converted, the Company shall have received a written notice at its said office or agency from the holder of the Debenture or Debentures so surrendered specifying the name or names (with address) in which said certificate or certificates are to be issued. For convenience, the conversion of all or a portion, as the case may be, of the principal of any Debenture into Common Stock is hereinafter sometimes referred to as the conversion of such Debenture. All Debentures surrendered for conversion shall, if surrendered to the Com-

pany or any conversion agent, be delivered to the Trustee for cancelation and cancelled by it or, if surrendered to the Trustee, shall be cancelled by it, and no Debentures shall be issued in lieu thereof. The Trustee within a reasonable time shall upon request return cancelled Debentures to the Company.

In case any Debenture shall be surrendered for conversion of only a portion of the principal amount thereof, the Company shall execute and the Trustee shall authenticate and deliver to the holder of such Debenture, at the expense of the Company, a new Debenture or Debentures in principal amount equal to the unconverted portion of the Debenture so surrendered.

In case of the surrender of any Debenture for conversion (in whole or in part) on a date after the record date (as defined in Section 2.03) for the payment of any interest on Debentures and before the date for payment of such interest, such Debenture shall be accompanied by funds in an amount equal to the amount of interest which would have been payable on such interest payment date in respect of the principal represented by the Debenture (or portion thereof) so surrendered for conversion had the same not been so surrendered for conversion; *provided, however,* that no such funds need be deposited in the case of any Debenture (or portion thereof) which has been duly called for redemption prior to such interest payment date. The funds so deposited shall be paid on the interest payment date to the person in whose name such Debenture (or the Debenture or Debentures in exchange or substitution for which such Debenture shall have been issued) was registered on such record date; *provided, however,* that if the Company shall default in the payment of interest due on the Debentures on such interest payment date, such funds shall be repaid to the person who deposited the same.

SECTION 5.02. As promptly as practicable after the surrender, as herein provided, of any Debenture or Debentures for conversion, the Company shall deliver or cause to be delivered at the office or agency to be maintained by it in accordance with the provisions of Section 6.02 to or upon the written order of the holder of the Debenture or

Debentures so surrendered a certificate or certificates representing the number of fully paid and non-assessable shares of Common Stock into which such Debenture or Debentures (or portion thereof) shall have been converted in accordance with the provisions of this Article Five. Prior to delivery of such certificate or certificates, the Company shall have received at its said office or agency from the holder of the Debenture or Debentures so surrendered the written notice referred to in Section 5.01 with respect to the name or names (with address) in which said certificate or certificates are to be issued. Subject to the following provisions of this Section and of Section 5.04, such conversion shall be deemed to have been made immediately prior to the close of business on the date that such Debenture or Debentures shall have been surrendered for conversion, so that the rights of the holder of such Debenture or Debentures (or the portion thereof being converted) as a Debentureholder shall cease at such time, and the person or persons entitled to receive the shares of Common Stock upon conversion of such Debenture or Debentures shall be treated for all purposes as having become the record holder or holders of such shares of Common Stock at such time, and such conversion shall be at the conversion rate in effect at such time; *provided, however,* that no such surrender on any date when the stock transfer books of the Company shall be closed shall be effective to constitute the person or persons entitled to receive the shares of Common Stock upon such conversion as the record holder or holders of such shares of Common Stock on such date, but such surrender shall be effective to constitute the person or persons entitled to receive such shares of Common Stock as the record holder or holders thereof for all purposes at the time immediately prior to the close of business on the next succeeding day on which such stock transfer books are open, and such conversion shall be at the conversion rate in effect at such time on such next succeeding day.

SECTION 5.03. No adjustments in respect of accrued interest or dividends shall be made upon the conversion of any Debenture or Debentures.

SECTION 5.04. The conversion rate from time to time in effect shall be subject to adjustment as follows:

(a) In case the Company shall (i) pay a dividend in shares of its capital stock, (ii) subdivide its outstanding shares of Common Stock, (iii) combine its outstanding shares of Common Stock into a smaller number of shares, or (iv) issue by reclassification of its shares of Common Stock any shares of the Company, the conversion rate in effect immediately prior thereto shall be adjusted retroactively as provided below so that the holder of any Debenture thereafter surrendered for conversion shall be entitled to receive the number of shares of the Company which he would have owned or have been entitled to receive after the happening of any of the events described above had such Debenture been converted immediately prior to the happening of such event. An adjustment made pursuant to this subsection (a) shall become effective retroactively immediately after the record date in the case of a dividend and shall become effective immediately after the effective date in the case of a subdivision, combination or reclassification.

(b) In case the Company shall issue rights or warrants to all holders of its Common Stock entitling them (for a period expiring within 45 days after the record date mentioned below) to subscribe for or purchase shares of Common Stock at a price per share less than the current market price per share of Common Stock (as defined in subsection (d) below) at the record date mentioned below, the number of shares of Common Stock into which each $1,000 principal amount of Debentures shall thereafter be convertible shall be determined by multiplying the number of shares of Common Stock into which such principal amount of Debentures was theretofore convertible by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding on the date of issuance of such rights or warrants plus the number of additional shares of Common Stock offered for subscription or purchase, and the denominator of which shall

be the number of shares of Common Stock outstanding on the date of issuance of such rights or warrants plus the number of shares which the aggregate offering price of the total number of shares so offered would purchase at such current market price. Subject to subsection (e), such adjustment shall be made whenever such rights or warrants are issued and shall become effective retroactively immediately after the record date for the determination of stockholders entitled to receive such rights or warrants.

(c) In case the Company shall distribute to all holders of its Common Stock evidences of its indebtedness or assets (excluding cash dividends or distributions) or rights to subscribe or warrants to purchase (excluding those referred to in subsection (b) above), then in each such case the number of shares of Common Stock into which each $1,000 principal amount of Debentures shall thereafter be convertible shall be determined by multiplying the number of shares of Common Stock into which such principal amount of Debentures was theretofore convertible by a fraction, the numerator of which shall be the current market price (as defined in subsection (d) below) per share of Common Stock on the date of such distribution, and the denominator of which shall be such current market price per share of the Common Stock, less the then fair market value (as determined by the Board of Directors, whose determination shall be conclusive, and described in a statement filed with the Trustee) of the portion of the assets or evidences of indebtedness so distributed or of such subscription rights or warrants applicable to one share of the Common Stock. Subject to subsection (e), such adjustment shall be made whenever any such distribution is made and shall become effective retroactively immediately after the record date for the determination of stockholders entitled to receive such distribution.

(d) For the purpose of any computation under subsections (b) and (c) above, the current market price per share of Common Stock at any date shall be deemed to be the average of the daily closing prices for the 30 consecutive business days com-

mencing 45 business days before the day in question. The closing price for each day shall be the last reported sales price regular way or, in case no such reported sale takes place on such day, the average of the reported closing bid and asked prices regular way, in either case on the New York Stock Exchange, or, if the Common Stock is not listed or admitted to trading on such Exchange, on the principal national securities exchange on which the Common Stock is listed or admitted to trading, or if not listed or admitted to trading on any national securities exchange, the average of the closing bid and asked prices as furnished by any New York Stock Exchange firm selected from time to time by the Company for the purpose.

(e) No adjustment in the conversion rate shall be required unless such adjustment would require an increase or decrease of at least 1% in such rate; *provided, however*, that any adjustments which by reason of this subsection (e) are not required to be made shall be carried forward cumulatively and taken into account in any subsequent adjustment which (including such carry-forward) requires an increase or decrease of at least 1%. All calculations under this Article Five shall be made to the nearest cent or to the nearest one-thousandth of a share, as the case may be.

(f) Whenever the conversion rate is adjusted, as herein provided, the Company shall promptly file with the Trustee a certificate of a firm of independent public accountants selected by the Board of Directors (who may be the regular accountants employed by the Company) setting forth the conversion rate applicable after such adjustment and setting forth a brief statement of the facts requiring such adjustment. Such certificate shall be conclusive evidence of the correctness of such adjustment. Promptly after receipt of such certificate, the Trustee, in the name of the Company and as its agent, shall mail a notice specifying such adjustment to each Debentureholder at his last address appearing on the registration books of the Company. The Trustee shall not at any time be under any duty or responsibility to any Debentureholder

to determine whether any facts exist which may require any adjustment of the conversion rate.

(g) In the event that at any time, as a result of an adjustment made pursuant to subsection (a) of this Section, the holder of any Debenture thereafter surrendered for conversion shall become entitled to receive any shares of the Company other than shares of its Common Stock, thereafter the number of such other shares so receivable upon conversion of any Debenture shall be subject to adjustment from time to time in a manner and on terms as nearly equivalent as practicable to the provisions with respect to the Common Stock contained in subsections (a) to (f), inclusive, of this Section, and the provisions of Sections 5.02 and 5.05 to 5.09, inclusive, with respect to the Common Stock shall apply on like terms to any such other shares.

SECTION 5.05. No fractional shares or scrip representing fractional shares shall be issued upon the conversion of any Debenture or Debentures. If more than one Debenture shall be surrendered for conversion at one time by the same holder, the number of full shares issuable upon conversion thereof shall be computed on the basis of the aggregate principal amount of the Debentures so surrendered. If the conversion of any Debenture or Debentures results in a fraction, an amount equal to such fraction multiplied by the closing price (determined as provided in Section 5.04(d)) of the Common Stock on the day of conversion shall be paid to such holder in cash by the Company.

SECTION 5.06. In case of any consolidation of the Company with or merger of the Company into another corporation, or in case of any sale or other disposition of all or substantially all the property of the Company as an entirety to any person, the corporation resulting from such consolidation or such successor or acquiring person, as the case may be, shall execute and deliver to the Trustee a supplemental indenture, in form satisfactory to the Trustee, providing that the holder of each Debenture then outstanding shall have the right thereafter to convert such Debenture into the kind and amount of shares of

stock and other securities and property receivable upon such consolidation, merger, sale, lease or other disposition by a holder of the number of shares of Common Stock of the Company into which such Debenture might have been converted immediately prior to such consolidation, merger, sale or other disposition. Such supplemental indenture shall provide for adjustments which shall be as nearly equivalent as may be practicable to the adjustments provided for in this Article Five. The provisions of this Section shall similarly apply to successive consolidations, mergers, sales or other dispositions. Notice of the execution of such a supplemental indenture shall be given in accordance with the provisions of Section 12.02.

The Trustee shall not be under any responsibility to determine the correctness of any provisions contained in any such supplemental indenture relating either to the kind or amount of shares of stock or securities or property receivable by Debentureholders upon the conversion of their Debentures after any such consolidation, merger, sale, lease or other disposition or to any such adjustment, but, subject to the provisions of Section 9.01, may accept as conclusive evidence of the correctness of any such provisions, and shall be protected in relying upon, an Opinion of Counsel with respect thereto.

SECTION 5.07. The Company covenants that it will at all times reserve and keep available out of its authorized Common Stock, solely for the purpose of issuance upon conversion of Debentures as herein provided, such number of shares of Common Stock as shall then be issuable upon the conversion of all outstanding Debentures. The Company covenants that all shares of Common Stock which shall be so issuable shall, when issued, be duly and validly issued and fully paid and non-assessable.

The Company covenants that, upon conversion of Debentures as herein provided, there will be credited to Common Stock capital account, from the consideration for which the shares of Common Stock issuable upon such conversion are issued, an amount per share of Common Stock so issued as determined by the Board of Directors, which amount shall not be less than the amount required by law

and by the Certificate of Incorporation of the Company, as amended, as in effect on the date of such conversion. For the purposes of this covenant the principal amount of the Debentures converted, less the amount of cash paid in lieu of the issuance of fractional shares on such conversion, shall be deemed to be the amount of consideration for which the shares of Common Stock issuable upon such conversion are issued.

SECTION 5.08. The Company covenants that if any shares of Common Stock required to be reserved for purposes of conversion of Debentures hereunder require registration with or approval of any governmental authority under any Federal or State law before such shares may be issued upon conversion, the Company will in good faith and as expeditiously as possible endeavor to cause such shares to be duly registered or approved, as the case may be. The Company further covenants that, at any time when the Common Stock of the Company is listed on the New York Stock Exchange or any other national securities exchange, the Company will, if permitted by the rules of such exchange, list and keep listed on such exchange, upon official notice of issuance, all shares of Common Stock issuable upon conversion of Debentures.

SECTION 5.09. The issuance of certificates for shares of Common Stock upon the conversion of Debentures shall be made without charge to the converting Debentureholders for any tax in respect of the issuance of such certificates, and such certificates shall be issued in the respective names of, or in such names as may be directed by, the holders of the Debentures converted; *provided, however,* that the Company shall not be required to pay any tax which may be payable in respect of any transfer involved in the issuance and delivery of any such certificate in a name other than that of the holder of the Debenture converted, and the Company shall not be required to issue or deliver such certificates unless or until the person or persons requesting the issuance thereof shall have paid to the Company the amount of such tax or shall have established to the satisfaction of the Company that such tax has been paid.

SECTION 5.10. In case the Company proposes to take any action (other than actions of the character described in clauses (i), (ii) or

(iii) of subsection (a) of Section 5.04) which would require an adjustment of the conversion rate pursuant to Section 5.04 or proposes to take any action of the type specified in Section 5.06, the Company shall give notice to the holders of Debentures at their last addresses as they shall appear upon the register or registers provided for in Section 2.05 at least ten days prior to the applicable record date in the case of action which would require an adjustment of the conversion rate pursuant to Section 5.04 and at least ten days prior to the taking of any action described in Section 5.06, which notice shall state (i) in the case of action requiring an adjustment of the conversion rate pursuant to Section 5.04, the record date as of which such action is to be taken and (ii) in the case of action specified in Section 5.06, the date on which such action is to become effective, and in each case such notice shall describe the action to be taken and, to the extent such effect may be known at the date of such notice, the effect of such action on the conversion ratio and the number, or kind, or class of shares or other securities or property obtainable upon conversion of the Debentures. Failure to give such notice or any defect therein shall not affect the legality or validity of any such action.

SECTION 5.11. The Trustee shall not be accountable with respect to the validity or value (or the kind or amount) of any shares of Common Stock or of any securities or property which may at any time be issued or delivered upon the conversion of any Debentures; and it makes no representation with respect thereto. The Trustee shall not be responsible for any failure of the Company to make any cash payment or to issue, transfer or deliver any shares of Common Stock or stock certificates or other securities or property upon the surrender of any Debenture for the purpose of conversion, or to comply with any of the covenants of the Company contained in this Article Five, all subject to Section 9.01.

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ARTICLE TWELVE

Supplemental Indentures

Section 12.01. In addition to any supplemental indenture that may be entered into pursuant to the provisions of Section 5.06, the Company, when authorized by a resolution of its Board of Directors, and the Trustee may from time to time and at any time enter into an indenture or indentures supplemental hereto (which shall conform to the provisions of the Trust Indenture Act of 1939 as then in effect) for one or more of the following purposes:

(a) to evidence the succession of another corporation to the Company, or successive successions, and the assumption by the successor corporation of the covenants, agreements and obligations of the Company pursuant to Article Thirteen;

(b) to add to the covenants and agreements of the Company in this Indenture contained such further covenants and agreements thereafter to be observed and to surrender any right or power herein reserved to or conferred upon the Company;

(c) to cure any ambiguity or to correct or supplement any defective or inconsistent provision contained in this Indenture or in any supplemental indenture; and

(d) to make such provisions with respect to matters or questions arising under this Indenture as may be necessary or desirable and not inconsistent with this Indenture; *provided, however,* that such actions shall not adversely affect the interests of the holders of any of the Debentures.

The Trustee is hereby authorized to join with the Company in the execution of any supplemental indenture authorized or permitted by the terms of this Indenture, and to make any further appropriate agreements and stipulations which may be therein contained, but the Trustee shall not be obligated to enter into any such supplemental indenture which affects the Trustee's own rights, duties or immunities under this Indenture or otherwise.

Any supplemental indenture authorized by the provisions of this Section may be executed by the Company and the Trustee without the consent of the holders of any of the Debentures at the time outstanding.

SECTION 12.02. With the consent (evidenced as provided in Section 10.01) of the holders (or persons entitled to vote or to give consents respecting the same) of not less than 66⅔% in aggregate principal amount of the Debentures at the time outstanding, the Company, when authorized by a resolution of its Board of Directors, and the Trustee may from time to time and at any time enter into an indenture or

indentures supplemental hereto (which shall conform to the provisions of the Trust Indenture Act of 1939 as then in effect) for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Indenture or of any supplemental indenture or of modifying in any manner the rights and obligations of the holders of the Debentures and of the Company; *provided, however,* that no such supplemental indenture shall (i) extend the fixed maturity of any Debentures, or reduce the principal amount thereof, or reduce the rate or extend the time of payment of interest thereon, or reduce any premium payable upon the redemption thereof, or alter or impair the right to convert the same into shares of Common Stock at the rates and upon the terms provided herein, without the consent of the holder of each Debenture so affected, or (ii) reduce the aforesaid percentage of Debentures, the holders of which are required to consent to any such supplemental indenture, without the consent of the holders of all Debentures then outstanding.

Upon the request of the Company, accompanied by a copy of a resolution of its Board of Directors certified by the Secretary or an Assistant Secretary of the Company authorizing the execution of any such supplemental indenture, and upon the filing with the Trustee of evidence of the consent of Debentureholders as aforesaid, the Trustee shall join with the Company in the execution of such supplemental indenture unless such supplemental indenture affects the Trustee's own rights, duties or immunities under this Indenture or otherwise, in which case the Trustee may, in its discretion, but shall not be obligated to, enter into such supplemental indenture.

It shall not be necessary for the consent of the Debentureholders under this Section to approve the particular form of any proposed supplemental indenture, but it shall be sufficient if such consent shall approve the substance thereof.

Promptly after the execution by the Company and the Trustee of any supplemental indenture pursuant to the provisions of this Section, the Company shall mail, first class postage prepaid, to the holders of Debentures at their last addresses as they shall appear upon the register or registers a notice setting forth in general terms the substance of such supplemental indenture. Any failure of the Company to mail

such notice, or any defect therein, shall not, however, in any way impair or affect the validity of any such supplemental indenture.

SECTION 12.03. Upon the execution of any supplemental indenture pursuant to the provisions of this Article Twelve or of Sections 5.06 and 13.01 this Indenture shall be and be deemed to be modified and amended in accordance therewith and the respective rights, limitation of rights, obligations, duties and immunities under this Indenture of the Trustee, the Company and the holders of Debentures shall thereafter be determined, exercised and enforced hereunder subject in all respects to such modifications and amendments, and all the terms and conditions of any such supplemental indenture shall be and be deemed to be part of the terms and conditions of this Indenture for any and all purposes.

SECTION 12.04. Debentures authenticated and delivered after the execution of any supplemental indenture pursuant to the provisions of this Article Twelve or of Sections 5.06 and 13.01, or after any action taken at a Debentureholders' meeting pursuant to Article Eleven, may bear a notation in form approved by the Trustee as to any matter provided for in such supplemental indenture or as to any action taken at any such meeting; and, in such case, suitable notation may be made upon outstanding Debentures after proper presentation and demand. If the Company or the Trustee shall so determine, new Debentures so modified as to conform, in the opinion of the Trustee and the Board of Directors, to any modification of this Indenture contained in any such supplemental indenture, or to any action taken at any such meeting, may be prepared by the Company, authenticated by the Trustee and delivered in exchange for the Debentures then outstanding, upon demand of, and without cost to, the holders thereof, upon surrender of such Debentures.

SECTION 12.05. The Trustee, subject to the provisions of Section 9.01, may receive an Opinion of Counsel as conclusive evidence that any supplemental indenture executed pursuant to this Article Twelve is authorized or permitted by the terms of this Indenture and that it is not inconsistent therewith.

ARTICLE THIRTEEN

Consolidation, Merger and Sale

Section 13.01. The Company will not consolidate with, merge into or sell or otherwise dispose of all or substantially all the property of the Company as an entirety to, any person unless (a) the successor formed by or resulting from such consolidation or merger or the person to which such sale or other disposition shall have been made shall be a corporation organized under the laws of the United States of America or any State, district or territory thereof, and (b) such successor corporation (other than the Company) shall expressly assume, by indenture supplemental hereto satisfactory in form to the Trustee, executed and delivered to the Trustee by the corporation formed by such consolidation or into which the Company shall have been merged or by the corporation to which such sale or other disposition shall have been made, the due and punctual payment of the principal of and interest (and premium, if any) on the Debentures according to their tenor, and the due and punctual performance and observance of all the terms, covenants and conditions of this Indenture and the Debentures to be performed or observed by the Company. The Company will not so consolidate or merge, or make any such sale or other disposition, or permit any corporation to merge into the Company, unless immediately after such consolidation, merger, sale or other disposition the Company or such successor corporation, as the case may be, shall not be in default in the performance of any of the covenants, agreements or conditions contained in this Indenture or in the Debentures. Subject to the foregoing provisions of this Section, nothing contained in this Indenture or in any of the Debentures shall prevent any consolidation or merger of the Company with or into any other corporation or corporations (whether or not affiliated with the Company), or successive consolidations or mergers to which the Company or its successor or successors shall be a party or parties, or shall prevent any sale or other disposition (or successive sales or disposition) of all or substantially all the property and assets of the Com-

pany (or its successor or successors) as an entirety, to any other corporation (whether or not affiliated with the Company) lawfully entitled to acquire and operate the same. In the event of any such sale or disposition, the predecessor company may be dissolved, wound up and liquidated at any time thereafter.

SECTION 13.02. In case of any such consolidation, merger, sale or other disposition and upon the execution by the successor corporation of an indenture supplemental hereto, as provided in Section 13.01, and upon compliance by such successor corporation with all applicable provisions of Section 5.06, such successor corporation shall succeed to and be substituted for the Company, with the same effect as if it had been named herein as a party; and any order, certificate, statement, request, instructions, advice or resolutions of the Board of Directors or officers of the Company provided for in this Indenture may be made by like officials of such successor corporation.

Nothing contained in this Indenture or in any of the Debentures shall prevent the Company from acquiring by purchase or by merger or consolidation in which the Company is the surviving corporation, or otherwise, all or any part of the property of any other corporation (whether or not affiliated with the Company).

SECTION 13.03. The Trustee, subject to the provisions of Section 9.01, may receive an Opinion of Counsel as conclusive evidence that any such consolidation, merger, sale or other disposition, and any such assumption and supplemental indenture, complies with the provisions of this Article Thirteen.

JUDGMENT AND ORDER DESIGNATING CLASS ACTION
(Filed November 18, 1976) (pp. 393a-401a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

EDWARD BRUCKER and DANIEL R. KAPLAN, as Trustees under the Trust Agreement dated November 15, 1968, made by WILTRUD E. GADBOYS, as Grantor, CECIL G. HUSKEY, W. T. STRATTON and NORTE & CO., a partnership composed of JOSEPH C. GALDI and RITA D. GALDI,

Plaintiffs,

-against-

THYSSEN-BORNEMISZA EUROPE N.V., THYSSEN-BORNEMISZA, INC., THYSSEN-BORNEMISZA HOLDINGS, INC., MARINE MIDLAND BANK, INDIAN HEAD INC., JAMES G. FERGUSON, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALISTER, JOHN E. O'SULLIVAN, RICHARD J. POWERS, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, HERBERT E. BACHRACH, GERARD B. HUISKAMP, WHITE, WELD & CO. INCORPORATED, L. EMERY KATZENBACH, H. H. THYSSEN-BORNEMISZA, R. L. GENILLARD and CHEMICAL BANK,

Defendants.

74 Civ. 5755 (CES)

JUDGMENT AND ORDER

----------x

WILLIAM B. WEINBERGER,

Plaintiff,

-against-

RICHARD J. POWERS, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALISTER, JOHN E. O'SULLIVAN, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, JAMES G. FERGUSON, THYSSEN-BORNEMISZA, INC. and INDIAN HEAD INC.,

Defendants.

75 Civ. 229 (CES)

----------x

SHAMROCK CORPORATION, individually, and on behalf of all holders of Common Stock and Warrants of Indian Head Inc., similarly situated,

Plaintiffs,

-against-

INDIAN HEAD INC.; THYSSEN-BORNEMISZA GROUP N.V.; THYSSEN-BORNEMISZA, INC.; WHITE, WELD & CO. INCORPORATED; RICHARD J. POWERS; JAMES E. ROBISON, HERBERT E. BACHRACH; GERARD B. HUISKAMP; L. EMERY KATZENBACH; MARSHALL F. SMITH; H. H. THYSSEN-BORNEMISZA; R.L. GENILLARD; THYSSEN-BORNEMISZA HOLDINGS, INC. and CHEMICAL BANK,

Defendants.

75 Civ. 1736 (CES)

----------x

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The proposed settlement of these actions came on to be heard on October 13 and 18, 1976 before the Honorable Charles E. Stewart, Jr., in accordance with the Order of the Court entered August 2, 1976. Upon consideration of the papers submitted and the oral argument by counsel, and a memorandum opinion having been rendered and filed by the Court, November 16, 1976, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. These actions shall proceed as class actions on behalf of all members of each class designated as follows who have not heretofore requested exclusion in accordance with the Order of this Court entered August 2, 1976:

(i) Common Stock Class. All owners, beneficially or of record, of $1.00 par value common stock ("Common Stock") of Indian Head as of August 2, 1976 who continue to own such Common Stock on the date of the merger (the "Merger Date") to be effected as provided in the Settlement Agreement;

(ii) Debenture Owner Class. All owners, beneficially or of record, of 5-1/2% convertible subordinated debentures due April 15, 1993 of Indian Head ("Debentures") as of August 2, 1976 who continue to own such Debentures on the Merger Date;

(iii) Debenture Seller Classes. Former owners, beneficially or of record, of Debentures, as follows:

Debenture Seller Class A. All such owners on September 27, 1973 who sold such Debentures between September 27, 1973 and July 1, 1974, inclusive;

Debenture Seller Class B. All such owners on July 2, 1974 who sold such Debentures between July 12, 1974 and August 2, 1976, inclusive;

(iv) Warrant Owner Classes. Owners, beneficially or of record, of warrants issued pursuant to the Warrant Agreement dated as of May 15, 1965 between Indian Head and Chemical Bank ("Warrants"), as follows:

Warrant Owner Class A. All such owners as of August 2, 1976 who continue to own such Warrants on the Merger Date;

Warrant Owner Class B. All members of Warrant Owner Class A who were owners of such Warrants on July 2, 1974;

(v) Warrant Seller Classes. Former owners, beneficially or of record, of Warrants as follows:

Warrant Seller Class A. All such owners on July 2, 1974 who sold such Warrants between July 12, 1974 and August 2, 1976, inclusive;

Warrant Seller Class B. All such owners who sold such Warrants between August 1, 1973 and July 1, 1974, inclusive.

2. The terms and conditions of the settlement and merger as set forth in the Stipulation and Agreement of Settlement dated July 20, 1976, as amended by the Amendment to Stipulation and Agreement of Settlement dated July 28, 1976 (the "Settlement Agreement"), the original of which has been filed with the Court, are in all respects fair, reasonable and adequate, and are hereby approved by this Court, and shall be consummated as provided in the Settlement Agreement.

3. The three above-captioned actions, the complaints therein and all claims asserted or which might have been asserted therein are hereby dismissed without costs, with prejudice and on the merits against plaintiffs and class members and in favor of all named defendants, whether or not served with a summons and complaint, including their successors and assigns.

4. Within ten (10) business days after the Merger Date, TBI shall cause to be mailed at its expense, by United States mail, postage prepaid, to each and every member of the Debenture Owner Class and Warrant Owner Classes Transmittal Letters substantially in the form of Exhibit "E" annexed to the Settlement Agreement.

5. Each brokerage firm and financial institution which is or was or whose nominee is or was the record owner of Common Stock, Debentures

or Warrants so as to be a member of the Common Stock Class, Debenture Owner Class or a Warrant Owner Class shall transmit any Transmittal Letters received to the beneficial owners of such Common Stock, Debentures or Warrants who are members of such classes and shall request such additional Transmittal Letters as are necessary to comply with this order.

6. In order to assert a claim to the Debenture Settlement Fund or Warrant Settlement Fund, respectively, provided for in the Settlement Agreement, a member of the Debenture Owner Class or of a Warrant Owner Class shall mail to the Clerk of the United States District Court for the Southern District of New York, P.O. Box 1046, New York, New York 10005, a Transmittal Letter with all attachments required thereby in the manner provided for therein within sixty (60) days after the Merger Date.

7. Marine Midland Bank ("Marine") and Chemical Bank ("Chemical") are hereby appointed to review all Proofs of Claim and Transmittal Letters (together with all documents required thereby) submitted by all members of the Debenture Owner Class and Debenture Seller Classes and by all members of the Warrant Owner Classes and Warrant Seller Classes, respectively, and the following terms and conditions shall govern:

(a) Marine and Chemical shall, within ninety (90) days after the Merger Date, or such further time as the court may allow,

give written notice to Shearman & Sterling and to Austrian, Lance & Stewart, P.C. as to (i) which Proofs of Claim and Transmittal Letters they accept for purposes of payment hereunder and the amount of such payment, (ii) which Proofs of Claim and Transmittal Letters, accepted for payment, have been submitted by persons who, according to written advice from Shearman & Sterling pursuant to subparagraph 4(h) of the Settlement Agreement, have filed or are participating in an appeal or have sought or obtained or are participating in seeking or obtaining an extension of time to appeal from this Judgment and Order or are engaged in any action, suit or proceeding challenging this Judgment and Order and (iii) which Proofs of Claim and Transmittal Letters they do not accept for payment and the reasons therefor;

(b) Marine and Chemical shall make available continuously as received all Proofs of Claim and Transmittal Letters to Shearman & Sterling and Austrian, Lance & Stewart, P.C., for their inspection, and shall fully cooperate with both firms in any inquiries they may make;

(c) Within thirty (30) days after receipt of notice pursuant to subparagraph (a) above, Shearman & Sterling and Austrian, Lance & Stewart, P.C., shall confer with Marine and Chemical and with each other in an attempt to resolve any dispute that may arise concerning

such Proofs of Claim or Transmittal Letters and, in the event that such dispute cannot be so resolved within such thirty (30) day period, the objecting party shall submit such objection to the Court for resolution;

(d) As to all Proofs of Claim and Transmittal Letters to which no objection is made in the manner provided above, within ten (10) days after the conference referred to in subparagraph (c) above, but in any event not longer than forty (40) days after the date of notice pursuant to subparagraph (a) above, Marine and Chemical shall make payment in accordance with the provisions of the Debenture Escrow Agreement and Warrant Escrow Agreement, respectively, to all class members whose Proofs of Claim and/or Transmittal Letters are accepted for payment and shall withhold payment to any and all persons described in subparagraph 7(a)(ii) hereof until they receive written advice from Shearman & Sterling pursuant to subparagraph 4(h) of the Settlement Agreement, and shall, from time to time, promptly make payment to those persons whose Proofs of Claim and/or Transmittal Letters are no longer the subject of dispute (i) pursuant to written advice to such effect by Shearman & Sterling and Austrian, Lance & Stewart, P.C. or (ii) pursuant to a duly

entered order of the Court resolving such a dispute.

8. All plaintiffs and class members and their heirs, executors, administrators, personal representatives, successors and assigns are hereby permanently enjoined from prosecuting any individual, class or derivative claims arising out of or relating to the matters set forth in the complaints, including any claim related to consummation of the merger, other than a proceeding for appraisal pursuant to Section 262 of the Delaware General Corporation Law, against any of the named defendants whether or not served with a summons and complaint, their personal representatives, trustees, heirs and assigns and, as to the corporate defendants, in addition, their predecessors, successors, parents, subsidiaries, affiliates and present or former directors, officers, employees, attorneys and agents or against any other person; and permanently enjoining all members of the Common Stock Class from prosecuting any derivative claims arising out of or relating to said matters.

9. Jurisdiction is hereby retained by this Court for the purpose of entering such further orders as may be necessary or appropriate in administering or effectuating the provisions of the Settlement Agreement, including the application by the attorneys for the classes for

attorneys' fees and disbursements as set forth in the Settlement Agreement.

Dated: New York, New York
November 18, 1976

Charles E. Stewart J.
U. S. D. J.

JUDGMENT ENTERED
November 18, 1976

Raymond F. Burghardt
Clerk

ROMES' NOTICE OF MOTION TO ALTER OR AMEND JUDGMENT
(Filed November 23, 1976) (pp. 402a-411a)

NOV 23 1976
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER et al.,
Plaintiffs,

-- against --

THYSSEN-BORNEMISZA EUROPE N.V. et al.,
Defendants.

74 Civ. 5755 (CES)

WILLIAM B. WEINBERGER,
Plaintiff,

-- against --

RICHARD J. POWERS et al.,
Defendants.

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75 Civ. 229 (CES)

SHAMROCK CORPORATION et al.,
Plaintiffs,

-- against --

INDIAN HEAD INC. et al.,
Defendants

75 Civ. 1736 (CES)

TO: Shearman & Sterling
53 Wall Street
New York, New York 10005

Austrian, Lance & Stewart, P.C.
630 Fifth Avenue
Rockefeller Center
New York, N.Y. 10020

Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005

Weinstein & Levinson
11 Park Plaza
New York, N.Y. 10007

Richard J. Cutler, Esq.
c/o Indian Head Inc.
1211 Avenue of the Americas
New York, N.Y. 10036

Wolf, Haldenstein, Adler, Freeman,
Herz & Frank
270 Madison Avenue
New York, N.Y. 10016

MOTION TO ALTER OR AMEND JUDGMENT AND ORDER

Richard J. Cutler, Esq.
1211 Avenue of the Americas
New York, N.Y. 10036

PLEASE TAKE NOTICE that the within proposed Motion to Alter or Amend Judgment and Order will be filed with and presented to the Honorable Charles E. Stewart, Jr., United States District Judge for the Southern District of New York, in Room 2602, United States Courthouse, 40 Centre Street, New York, New York, not later than 10 days after entry of the said Judgment and Order, as specified in Rule 59(e) of the Federal Rules of Civil Procedure, on November 24, 1976 at 3:00 P.M.

EDWIN P. ROME
MORTON P. ROME
Attorneys for Morton P. Rome and Marjorie T. Rome, Trustees under Trust Agreement made November 22, 1954, for the benefit of Sally P. Rome, Objectors
Four Penn Center Plaza
Philadelphia, Pa. 19103
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OF COUNSEL
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BRUCE A. HECKER
IRA POSTEL
SHEA, GOULD, CLIMENKO & CASEY
330 Madison Avenue
New York, N.Y. 10017
Telephone No. 212-661-3200

Dated: November 22, 1976
Philadelphia, Pa.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER et al.,
Plaintiffs,

-- against --

THYSSEN-BORNEMISZA EUROPE N.V. et al.,
Defendants.

74 Civ. 5755 (CES)

WILLIAM B. WEINBERGER,
Plaintiff,

-- against --

RICHARD J. POWERS et al.,
Defendants.

75 Civ. 229 (CES)

SHAMROCK CORPORATION et al.,
Plaintiffs,

-- against --

INDIAN HEAD INC. et al.,
Defendants.

75 Civ. 1736 (CES)

ORDER AMENDING JUDGMENT AND ORDER

This cause came on to be heard on motion of Morton P. Rome and Marjorie T. Rome, Trustees under Trust Agreement made November 22, 1954, for the benefit of Sally P. Rome, Objectors, that the Judgment and Order entered in this cause on November 19, 1976, be amended so as to adjudge that Paragraph 8 thereof shall be deleted in its entirety, and the Court upon consideration of the papers submitted and the argument of counsel and being fully advised, IT IS

ORDERED, that Paragraph 8 of the said Judgment and Order heretofore entered in this cause on November 19, 1976, be deleted in its entirety, and that Paragraph 9 thereof be amended and renumbered as Paragraph 8 therein.

Dated:

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER et al.,
Plaintiffs,

-- against --

THYSSEN-BORNEMISZA EUROPE N.V. et al.,
Defendants.

74 Civ. 5755 (CES)

WILLIAM B. WEINBERGER,
Plaintiff,

-- against --

RICHARD J. POWERS et al.,
Defendants

75 Civ. 229 (CES)

SHAMROCK CORPORATION et al.,
Plaintiffs,

-- against --

INDIAN HEAD INC. et al.,
Defendants

75 Civ. 1736 (CES)

MOTION TO ALTER OR AMEND
JUDGMENT AND ORDER

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, Morton P. Rome and Marjorie T. Rome, Trustees under Trust Agreement made November 22, 1954 for the benefit of Sally P. Rome ("Objectors"), move the Court to alter or amend the Judgment and Order entered in the captioned proceedings on November 19, 1976, by deleting in its entirety Paragraph 8 thereof, which reads as follows:

> "8. All plaintiffs and class members and their heirs, executors, administrators, personal representatives, successors and assigns are hereby permanently enjoined from prosecuting any individual, class or derivative claims arising out of or relating to the matters set forth in the complaints, including any claim related to consummation of the merger, other than a proceeding for appraisal pursuant to Section 262 of the

> Delaware General Corporation Law, against any of the named defendants whether or not served with a summons and complaint, their personal representatives, trustees, heirs and assigns and, as to the corporate defendants, in addition, their predecessors, successors, parents, subsidiaries, affiliates and present or former directors, officers, employees, attorneys and agents or against any other person, and permanently enjoining all members of the Common Stock Class from prosecuting any derivative claims arising out of or relating to said matters."

and amending Paragraph 9 thereof so as to be renumbered Paragraph 8 on the following grounds:

1. The Order of this Court, dated August 2, 1976, which is hereby incorporated herein by this reference, contained a stay and injunction which was issued without notice, without any showing of immediate and irreparable loss or damage, without the giving of security and without setting forth the reasons for its issuance, in contravention of the provisions of Rule 65 of the Federal Rules of Civil Procedure.

2. The stay and injunction contained in said Order, dated August 2, 1976, was as follows:

> "ORDERED, that the institution, maintenance, or prosecution of any and all actions, suits, claims, arbitrations or any other proceedings by any person arising out of or relating to the subject matter of any of the pleadings in the above-captioned actions, the terms of the annexed Agreement or the merger provided for therein shall be stayed and enjoined in any court other than before the Honorable Charles E. Stewart, Jr. of the United States District Court for the Southern District of New York, pending entry of a judgment and order determining whether the settlement and merger as provided for in the annexed Agreement are fair, reasonable and adequate;"

3. The Notice of Indian Head Inc. Class Actions, Proposed Settlement and Hearing, dated August 2, 1976, mailed to Objectors and other Owners of Convertible Debentures similarly situated, which is hereby incorporated herein by this reference, contained no notice that any "class member" who properly appeared to contest the approval

of the Settlement would, if his objections were denied by the Court, be subjected to a permanent injunction enjoining his prosecution of any individual or class action claims arising out of or relating to the matters set forth in the complaints in the captioned proceedings, including any claim related to consummation of the merger.

4. The proponents of the proposed Settlement at the hearings thereon held October 13 and 18, 1976 failed and omitted to submit any evidence to support the grant of the permanent injunction, now provided for in this Court's Judgment and Order filed November 19, 1976.

5. The only colloquy on the subject of the right of Objectors to institute another action appeared at pages 51-52 of the Transcript of the hearing held October 13, 1976, and at pages 22-23 of the Transcript of the hearing held October 18, 1976, extracts of which are attached hereto and made a part hereof as Exhibit "A".

6. Prior to the entry of this Court's Judgment and Order on November 19, 1976, Objectors and Taussig & Taussig, (the latter being owners of Convertible Debentures who properly requested exclusion from the proposed Settlement), filed a Complaint which, inter alia, asserted claims arising out of and relating to matters set forth in the complaints in the captioned proceedings, including claims related to consummation of the merger, against some of the defendants named in the above actions, and their predecessors, parents, subsidiaries, affiliates and present or former directors, officers, agents and other persons. Said Complaint is docketed as 76 Civ. 5129 (CES), was filed on November 16, 1976, and is hereby incorporated herein by this reference and made a part hereof as though set forth at length herein.

7. Pursuant to Rule 201 of the Federal Rules of Evidence this Court is requested to take judicial notice of all the adjudicative facts referred to above in this Motion.

8. No reasons for the issuance of the said permanent injunction were set forth by this Court in either the Memorandum, dated November 15, 1976 or in the Judgment and Order entered November 19, 1976, in contravention of Rule 65(d) of the Federal Rules of Civil Procedure.

9. Objectors, while not "parties" to the action within the meaning of Rule 65(d), have received actual notice of the said Judgment and Order, and therefore do not desire to risk violation of the said permanent injunction contained therein, even though, in contravention of said Rule 65(d), the said permanent injunction describes by reference to the complaints or other documents the act or acts sought to be restrained.

10. By reason of the ambiguous wording of the permanent injunction contained in said Judgment and Order entered November 19, 1976, in addition to the possible interpretation that Objectors are permanently enjoined from prosecuting their class action in this Court filed on November 16, 1976 and docketed 76 Civ. 5129 (CES), although this action was instituted prior to the entry of said Judgment and Order and is not barred by this Court's Order, dated August 2, 1976, said permanent injunction might even be subject to the possible interpretation that Objectors are barred from prosecuting an appeal from said Judgment and Order, which they intend promptly to do. Moreover, the grant of said permanent injunction was made without any findings of fact and conclusions of law in respect thereof, in contravention of Rule 52 of the Federal Rules of Civil Procedure.

11. The inclusion of the above described permanent injunction in the said Judgment and Order, entered November 19, 1976, is violative of the U.S. Constitutional rights of Objectors and other owners of Convertible Debentures similarly situated to petition for redress of grievances under the First Amendment, and to due process of law under the Fifth and Fourteenth Amendments, and is in contravention of the Rules Enabling Act, 28 U.S.C. 2074, as amended November 6, 1966, Pub. L. 89-773, #1, 80 Stat. 1323, and Rules 23, 52, and 65 of the Federal Rules of Civil Procedure, and Sec. 259 of the Delaware General Corporation Law.

12. Therefore, the said permanent injunction imposes impermissible restraints on the individual freedom of Objectors and other owners of Convertible Debentures similarly situated, prohibits their lawful activity, and constitutes an instrumentality of wrong to and oppression of them, a proceedure deliberately and intentionally devised on behalf of the parties to the above actions by their attorneys in an effort to stifle the further contest by Objectors and other owners of Convertible Debentures similarly situated of the said Settlement and the further prosecution of the causes of action asserted in the class action Complaint docketed as 76 Civ. 5129 (CES), and to abridge and impair their civil rights.

13. For all of the above reasons this Motion to Alter or Amend Judgment and Order should be granted.

EDWIN P. ROME
MORTON P. ROME

Attorneys for Morton P. Rome and Marjorie T. Rome, Trustees under Trust Agreement made November 22, 1954, for the benefit of Sally P. Rome, Objectors
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New York, N.Y. 10017
Telephone No. 212-661-3200

" THE COURT: I am interrupting and I am slightly changing the subject, but not much. Suppose when all is said and done, I overrule your objections and approve the settlement so that it birds presumably the non-assenters who have not opted out, and I am assuming also that there would be an appeal from that, and suppose you lose all the way, and in the meantime you have brought another lawsuit-- I guess you can't bring another lawsuit now, can you?

MR. ROME: We think we can, your Honor. We are in the throes of preparing it.

THE COURT: Wouldn't the result of this matter have something to do with the validity of that other lawsuit?

MR. ROME: I am bound to acknwledge, sir, it would have something to do, but I respectfully submit that it would not bar our doing that.

THE COURT: No, it certainly won't bar your bringing a lawsuit.

MR. ROME: We (sic it) cannot be res judicata of our rights, your Honor, in our submission. And we would intend to bring that other suit to protect our rights and those of others who have not put their assent in writing."

EXHIBIT "A"

Extract of Colloquy at Hearing
Held October 13, 1976
Pages 51-52

"MR. SKLAVER: Your Honor, I was going to express a few thoughts. I think Mr. Rome has attempted to take this Court into an interpretation of the indenture.

It is my view, and perhaps it is over-simplification, and perhaps I just do not see the problem, but it appears to me that that question is irrelevant, the interpretation of the indenture.

If any debenture holder feels that he has a right to purchase stock in the merged company, the new subsidiary, if that person has opted out of this settlement, opted out of this lawsuit, he has a perfect right to maintain an action in the State courts, to have that right determined, to have the State court analyze the indenture and the debenture.

This settlement will give money to the debenture holders. In effect, they will cease to be debenture holders.

The way they get out of the settlement is by opting out.

THE COURT: But they have chosen not to, and I think they obviously have a right to argue the merits of this settlement.

MR. SKLAVER: That they do,. . . "

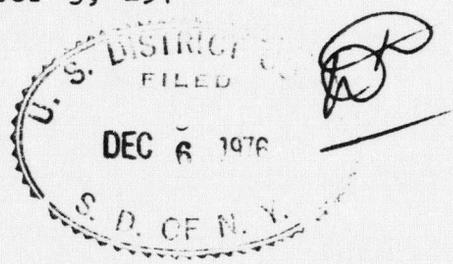
MEMORANDUM DENYING MOTION TO ALTER OR AMEND JUDGMENT
(Filed December 6, 1976)

74 Civ. 5755
75 Civ. 229
75 Civ. 1736

Motion to alter or amend Judgment and Order is denied pursuant to the hearing on November 29, 1976.

Charles E. Stewart, Jr.
U.S.D.J.

December 3, 1976.



DEC 06 1976
MICROFILM

DEC 0 1 1976
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER et al.,
Plaintiffs,

-- against --

THYSSEN-BORNEMISZA EUROPE N.V. et al.,
Defendants.

74 Civ. 5755 (CES)

place in

WILLIAM B. WEINBERGER,
Plaintiff,

-- against --

RICHARD J. POWERS et al.,
Defendants.

75 Civ. 229 (CES)

SHAMROCK CORPORATION et al.,
Plaintiffs,

-- against --

INDIAN HEAD INC. et al.,
Defendants

75 Civ. 1736 (CES)

NOTICE OF APPLICATION FOR PARTIAL STAY OF JUDGMENT AND ORDER PENDING APPEAL

TO: Shearman & Sterling
53 Wall Street
New York, New York 10005

Austrian, Lance & Stewart, P.C.
630 Fifth Avenue
Rockefeller Center
New York, N.Y. 10020

Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005

Weinstein & Levinson
11 Park Plaza
New York, N.Y. 10007

Richard J. Cutler, Esq.
c/o Indian Head Inc.
1211 Avenue of the Americas
New York, N.Y. 10036

Wolf, Haldenstein, Adler, Freeman,
Herz & Frank
270 Madison Avenue
New York, N.Y. 10016

PLEASE TAKE NOTICE that the within proposed Application for Partial Stay of Judgment and Order Pending Appeal will be filed with and presented to the Honorable Charles E. Stewart, Jr., United States District Judge for the Southern District of New York, in Room 2602, United States Courthouse, 40 Centre Street, New York, New York, pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure for the United States Courts of Appeals, on November 24, 1976 at 3:00 P.M.

s/ Edwin P. Rome

EDWIN P. ROME
MORTON P. ROME

Attorneys for Morton P. Rome and Marjorie T. Rome, Trustees under Trust Agreement made November 22, 1954, for the benefit of Sally P. Rome, Objectors
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BRUCE A. HECKER
IRA POSTEL
SHEA, GOULD, CLIMENKO & CASEY
330 Madison Avenue
New York, N.Y. 10017
Telephone No. 212-661-3200

Dated: November 22, 1976
Philadelphia, Pa.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER et al.,
Plaintiffs,
-- against --
THYSSEN-BORNEMISZA EUROPE N.V. et al.,
Defendants.

74 Civ. 3755 (CES)

WILLIAM B. WEINBERGER,
Plaintiff,
-- against --
RICHARD J. POWERS et al.,
Defendants.

75 Civ. 229 (CES)

SHAMROCK CORPORATION et al.,
Plaintiffs,
-- against --
INDIAN HEAD INC. et al.,
Defendants.

75 Civ. 1736 (CES)

ORDER GRANTING PARTIAL STAY
OF JUDGMENT AND ORDER PENDING
APPEAL

This cause came on to be heard on Application of Morton P. Rome and Marjorie T. Rome, Trustees under Trust Agreement made November 22, 1954 for the benefit of Sally P. Rome, Objectors, that the Judgment and Order entered in the captioned proceedings on November 19, 1976 be stayed in part as below set forth, pending appeal to the Court of Appeals for the Second Circuit, and the Court upon consideration of the papers submitted and the argument of counsel, and being fully advised, IT IS

ORDERED, that enforcement of the Judgment and Order entered November 19, 1976, as respects Objectors and all other owners of the 5 1/2% Convertible Subordinated Debentures, due April 15, 1993, of Indian Head Inc. who, to and including October 18, 1976, gave no affirmative consent to the Settlement in the captioned proceedings, be and is hereby stayed and suspended, pending timely appeal to the Court of Appeals for the Second Circuit of the said Judgment and Order by Objectors; and

FURTHER ORDERED, that the Notice, dated November 19, 1976 of Indian Head Inc. to the holders of the 5 1/2% Convertible Subordinated Debentures due April 15, 1993 of said corporation be promptly and appropriately modified and corrected to reflect this said partial stay and suspension as respects Objectors and all other non-consenting owners of the 5 1/2% Convertible Subordinated Debentures, due April 15, 1993, of Indian Head Inc., setting forth the position of Objectors, and otherwise comporting with the applicable provisions of Sections 13 and 14 of the Securities Exchange Act of 1934.

United States District Judge

Dated:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER et al.,
Plaintiffs,
-- against --
THYSSEN-BORNEMISZA EUROPE N.V. et al.,
Defendants.

74 Civ. 5755 (CES)

WILLIAM B. WEINBERGER,
Plaintiff,
-- against --
RICHARD J. POWERS et al.,
Defendants.

75 Civ. 229 (CES)

SHAMROCK CORPORATION et al.,
Plaintiffs,
-- against --
INDIAN HEAD INC. et al.,
Defendants.

75 Civ. 1736 (CES)

APPLICATION FOR PARTIAL STAY OF JUDGMENT AND ORDER PENDING APPEAL

Pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure for the United States Courts of Appeals, Morton P. Rome and Marjorie T. Rome, Trustees under Trust Agreement made November 22, 1954 for the benefit of Sally P. Rome, ("Objectors"), respectfully make application to the Court to stay in part enforcement of the Judgment and Order in the captioned proceedings entered November 19, 1976, pending appeal to the Court of Appeals for the Second Circuit and in support thereof set forth the following grounds:

1. The ultimate effect of this Court's Memorandum, dated November 15, 1976, and Judgment and Order entered November 19, 1976,

is to set a unique judicial precedent which, if not vacated, would enable the forced elimination and destruction of the right to convert into Common Stock of literally billions of dollars of outstanding convertible debentures in the United States by issuers thereof and their controlling persons through the device of "squeeze-out" mergers, without the consent of such debenture owners, without a justifiable business purpose, and without any federal or state statutory authorization.

(a) In Van Gemert v. The Boeing Co., 520 F. 2d 1373, 1381 n. 15 (2d Cir. 1975), cert. denied 423 U.S. 947 (1975), Judge Oakes writing for the Court of Appeals of this Second Circuit, in a panel with Circuit Judges Lumbard, Oakes, and Timbers, noted that in March, 1973 the aggregate amount of convertible bonds outstanding of companies listed and unlisted was $3,272,000,000.

2. Another ultimate effect of this Court's Memorandum, dated November 15, 1976, and Judgment and Order entered November 19, 1976, is to set a unique judicial precedent which will foreclose the future underwriting and issuance of debentures in the capital markets of the United States to issuers whose common stock price is expected to rise, and thereby force such issuers to pay the then prevalent market interest rate, instead of a lower-than-market interest rate on the convertible debentures. This future increase in financing costs for such issuers could and may well amount to billions of dollars, and thus practically destroy convertible debentures as a method of "deferred equity financing." (See Kusner v. First Pennsylvania Corporation, 531 F. 2d 1234, 1237-1238 (3d Cir. 1976)).

3. Despite this Court's opinion to the contrary, Objectors respectfully submit that the Memorandum, dated November 15, 1976, and Judgment and Order entered November 19, 1976, contains the following important precedential determinations which require ultimate appellate review and, it is submitted, are clearly erroneous:

(a) That a class action settlement under Rule 23 of the Federal Rules of Civil Procedure can effect abridgement and modification of the substantive rights of both dissenting and non-assenting convertible debenture owners, despite the Rules Enabling Act of the Congress (28 U.S.C. 2072, as amended).

(b) That the "indicated acceptance" of the class action Settlement by the owners of $1,384,000 (sic $1,390,000) out of $14,295,000 (sic $14,293,000) Convertible Debentures outstanding constitutes a "favorable reaction" of the Convertible Debenture Owner Class to the Settlement, and therefore allows or justifies the conclusion that the failure of affirmative response of owners of $12,850,000 of the Convertible Debentures (excluding owners of $27,000 who opted out and $26,000 who objected) constituted their affirmative written consent to the Settlement as required by the very terms of the several contracts of such Convertible Debenture owners, provided in Section 16.09 of the Indenture. (Cf. Memorandum, dated November 15, 1976, p. 13 and Transcript, October 13, 1976, p. 18)

(c) That despite the allegation of Objectors that the Settlement conflicted with or was adverse to the interests of "class members" who objected or did not give affirmative written assent to the Settlement, nevertheless the designation of the actions as "class actions for purposes of settlement only was proper in this case." (Cf. Memorandum, dated November 15, 1976, p. 14 with City of Detroit v. Grinnell Corporation, 495 F. 2d 448, 465 (2d Cir. 1974)).

(d) That despite the substitution of a fixed cash sum (the true purchasing power of which is under constant erosion by the continuing inflation) for common stock which has the potential to increase sufficiently in value

so that the conversion right will make the debenture worth more than the debt, as held in Boeing, supra, 520 F. 2d at 1385, "no substantive rights of the debenture holders are abridged by this settlement". (Memorandum, dated November 15, 1976, p. 18).

(e) That since "no substantive rights of the debenture holders are abridged by the Settlement", the claims of violations by the Settlement of the constitutional rights of Objectors and other Convertible Debenture owners similarly situated under the Fifth and Fourteenth Amendments and Article One, Section 10, to due process and freedom from impairment of the obligations of contract "are dispensed with." (Cf. Memorandum, dated November 15, 1976, p. 18 and Hansberry v. Lee, 311 U.S. 32, 44-45 (1940))

(f) That the "detailed and specific provision" as to what the debenture holders' rights are in a merger", set forth in Section 5.06 of the Indenture, controls and requires, in the event of a merger, the supplemental indenture to contain the right of owners of Convertible Debentures to convert only into whatever form of property the common shareholders receive upon the merger, and "cash" is within the scope of the term "property". Whereas in fact Section 5.06 of the Indenture specifies squarely that in the event of a merger the supplemental indenture shall contain the right to convert "into the kind and amount of shares of stock and other securities and property receivable upon such merger by a common stockholder immediately prior to such merger.

(i) Immediately prior to the merger contemplated in this Settlement, this right to convert was not into cash, but rather into 25.974 shares of Indian Head common stock. No cash was in existence available to the Indian Head common stockholders or Convertible Debenture owners immediately prior to the merger.

(ii) The cash the Indian h[illegible] common stockholders will receive is and will be after the Settlement and the effectiveness of the "squeeze-out" merger, and not immediately prior thereto.

(iii) The conjunction "and" appearing in the phrase of Section 5.06 "into the kind and amount of shares of stock and other securities and property receivable" upon such merger cannot be interpreted to be nor is it the same as the disjunctive "or".

(g) That the Convertible Debenture owners were "alerted" to the applicability of the merger provisions of the Indenture by the Debenture itself, which stated that the debenture holders' right to convert into common stock is "subject to such adjustment, if any, of the conversion rate and the securities or other property issuable upon conversion as may be required by the provisions of the Indenture." (Memorandum, dated November 15, 1976, p. 17, footnote 26). Whereas in fact the "adjustment" referred to in the Indenture on the reverse side of the Convertible Debenture only refers to Section 5.04 of the Indenture which has no applicability to a merger, and such alleged "alerting" is in direct conflict with the views expressed in Boeing Co., supra, 520 F. 2d at 1385.

(h) That the short-form merger "squeeze-out" decision in Green v. Santa Fe Industries, Inc., 533 F. 2d 1283 (2d Cir. 1976) is distinguishable from the attempted short-form merger "squeeze-out" in this case. (Memorandum, dated November 15, 1976, p. 12) Whereas in this case, as respects the dissenting and non-consenting Convertible Debenture owners, the alteration and impairment of their rights to convert into common stock by short-form merger is a fortiori the decision in Green, because not only is it forbidden by the Indenture contract itself, but also by Sec. 259 of the

Delaware Corporation Law, which mandates preservation of all creditors' rights in the event of any merger.

(i) That the class notice was "more than adequate" and Sec. 17(a) of the 1933 Securities Act and Secs. 10(b) and 14(e) of the 1934 Exchange Act have not been violated, and no terms or rights under the Indenture are violated, and therefore no action will lie under the Trust Indenture Act of 1939. (Memorandum, dated November 15, 1976, p. 22) Whereas, the omission without more from the Settlement Notice of disclosure of the facts concerning the several contract rights of Convertible Debenture owners to freedom from alteration or impairment of their rights to convert into Common Stock, without their consent, constitutes as a matter of law the omission of material facts which would have assumed actual significance in determining the choice of action of a reasonable owner of Convertible Debentures, pursuant to TSC Industries, Inc. v. Northway, Inc. -- U.S. -- 96 S. Ct. 2126 (1976).

(j) That while the "settlement agreement does contemplate what might technically be described as a tender offer", the Williams Act Sections 13(d), 13(e), 14(d), and 14(e)" were not meant to apply to judicially approved settlement agreements, particularly in light of legislative history." Whereas a class action settlement involving a tender offer requires an investment decision on the part of the security holder, even though it likewise requires judicial approval, and no Congressional exemption exists in the Williams Act to omit compliance therewith because judicial approval of a class action settlement must take place. Moreover, the burden to prove an exemption from the federal securities laws is on one who claims it, and no evidence in this case was submitted by proponents of the Settlement to support such exemption.

4. The partial stay of enforcement of the Judgment and Order herein sought is only with respect to Objectors and those other Convertible Debenture owners who did not affirmatively consent to the Settlement and merger contemplated therein, in order to preserve their rights.

5. Under date of November 19, 1976, and pursuant to Section 5.10 of the Indenture, there was sent to the holders of the 5 1/2% Convertible Subordinated Debentures due April 15, 1993, a notice, copy of which is attached hereto and made a part hereof as Exhibit "A" hereto.

(a) Said notice, it is submitted, failed and omitted to state material facts in that the nature of the objections to the Settlement was not disclosed, nor was there a disclosure of the several contract rights under the Indenture claimed by the Objectors to inure to the benefit of all Convertible Debenture owners to have their conversion rights into Indian Head Common Stock preserved unaltered and unimpaired in the event of a merger, contrary to the decision of the United States Supreme Court in TSC Industries Inc. v. Northway, Inc., supra.

(b) Said notice, it is also submitted, is likewise violative of the Williams Act provisions of the Securities Exchange Act of 1934, as a solicitation in connection with a tender offer, which omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made not misleading.

6. The partial stay of enforcement in the Judgment and Order sought, it is submitted, should likewise be accompanied by a direction to cause a corrective notice to be issued, pursuant to Section 5.10 of the Indenture, which comports with the requirements of the federal securities laws.

s/ Edwin P. Rome
EDWIN P. ROME
MORTON P. ROME

Attorneys for Morton P. Rome and Marjorie T. Rome, Trustees under Trust Agreement made November 22, 1954, for the benefit of Sally P. Rome, Objectors
Four Penn Center Plaza
Philadelphia, Pa. 19103
Telephone No. 215-569-3700

OF COUNSEL
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Philadelphia, Pa. 19103
Telephone No. 215-569-3700

BRUCE A. HECKER
IRA POSTEL
SHEA, GOULD, CLIMENKO & CASEY
330 Madison Avenue
New York, N.Y. 10017
Telephone No. 212-661-3200

Dated: November 22, 1976

EXHIBIT A - NOTICE DATED NOVEMBER 19, 1976 ANNEXED TO FOREGOING NOTICE OF APPLICATION (pp. 424a-425a)

Indian Head

1211 Avenue of the Americas
New York, New York 10036
Telephone (212) 764-3100

Executive Offices

November 19, 1976

To the holders of the 5½% Convertible Subordinated Debentures due April 15, 1993 of Indian Head Inc.:

This notice is provided pursuant to Section 5.10 of the Indenture dated as of April 15, 1968 (the "Indenture") between Indian Head Inc. (the "Company") and Marine Midland Bank, as Trustee, in order to inform holders of the Company's 5½% Convertible Subordinated Debentures due April 15, 1993 (the "Debentures") about the effect on the Debentures of the proposed Merger and Settlement referred to below.

Pursuant to a settlement (the "Settlement") of certain litigation brought against Thyssen-Bornemisza Inc. ("TBI") and certain other defendants, including the Company, TBI will cause the merger (the "Merger") of the Company into TBI's wholly-owned subsidiary, Thyssen-Bornemisza Holdings Inc. ("TBH"), a Delaware corporation organized solely to acquire the business of the Company. The Settlement was approved on November 16, 1976 by the United States District Court for the Southern District of New York after a hearing before such Court held on October 13, 1976 and October 18, 1976. TBI has been informed by the sole objector to the Settlement that he intends to appeal the District Court's approval of the Settlement. Subsequent to the decision of the District Court approving the Settlement, the objector brought an action before the District Court, purportedly on behalf of all holders of the Debentures. This action for the most part restates the objections which were presented to the District Court during the Settlement proceedings. The objector requests, among other things, that contrary to the matters set forth in the fourth paragraph hereof, the Debentures continue to be convertible into the Company's Common Stock, par value $1 per share (the "Common Stock"), subsequent to the Merger and that unspecified money damages be awarded to holders of the Debentures.

Pursuant to the terms of the Merger, the owners (other than TBH) of shares of Common Stock issued and outstanding at the time of the Merger are to be paid $32 per share in cash. **The effective date of the Merger (the "Merger Date") is expected to be November 30, 1976.** It is possible, however, that the Merger Date could be delayed beyond November 30, 1976 by further court proceedings.

The terms of the Indenture provide that, after the Merger, each $1,000 principal amount of Debentures will be convertible into $831.17 in cash and will no longer be convertible into Common Stock or any other security of the Company or TBH. This result occurs because the indenture provides that, upon the merger of the Company into another corporation, the holders of Debentures have the right to convert into the kind and amount of property receivable by the holders of the Common Stock in such merger. Since the holders of Common Stock will be entitled to a cash payment of $32 per share in the Merger, after the Merger $1,000 principal amount of Debentures will be convertible into an amount ($831.17) determined by multiplying

(i) the number of shares of Common Stock into which such $1,000 principal amount of Debentures would have been convertible immediately prior to such Merger (25.974 shares) by (ii) the per share price ($32) to be received by holders of shares of Common Stock in the Merger.

Pursuant to the terms of the Merger, TBH, as the surviving corporation, will assume the obligation to pay $831.17 per $1,000 principal amount of Debentures upon the conversion thereof and will assume the due and punctual payment of the principal of and interest (and premium, if any) on the Debentures according to their tenor and the due and punctual performance and observance of all the terms, covenants and conditions of the Indenture and Debentures to be performed or observed by the Company. As provided in the Indenture, TBH will execute and deliver to Marine Midland Bank, the Trustee under the Indenture, a supplemental indenture evidencing its assumption of the foregoing obligations.

As a holder of Debentures, you have the following options (the figures reflect a Debenture of $1,000 principal amount):

(1) After the Merger, to submit the Debentures (if held continuously since August 2, 1976) together with a Letter of Transmittal which will be mailed to all holders of Debentures after the Merger and receive, pursuant to the Settlement, a cash payment of $844.16 per Debenture plus an amount in cash equal to the accrued interest from the last interest payment date (October 15, 1976) to a date two days after the Merger Date; or

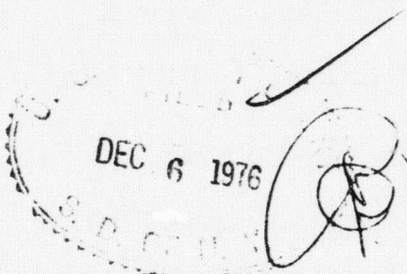
(2) After the Merger, to hold the Debentures and continue to receive periodic interest payments when due and principal payments at maturity with the option at any time after the Merger to convert the Debentures into a cash payment of $831.17 per Debenture, but it should be recognized that many holders of the Debentures may accept the cash payment offered in the Settlement, thereby reducing the number of Debentures held by the public and adversely affecting the liquidity of the market for such Debentures; or

(3) Prior to the Merger, to convert the Debentures into 25.974 shares of Common Stock per Debenture and seek appraisal of the Common Stock under Delaware law.

Holders of record of Debentures on the Merger Date will receive a further notice stating that the Merger has occurred and enclosing a Letter of Transmittal which may be used to submit Debentures pursuant to the Settlement for the $844.16 payment plus interest as set forth in paragraph (1) above. It is expected that such further notice will be mailed shortly after the Merger Date and that payment of Debentures pursuant to the Settlement will occur promptly after receipt of the Debentures together with a properly completed Letter of Transmittal.

INDIAN HEAD INC.

MEMORANDUM DENYING MOTION FOR PARTIAL STAY OF JUDGMENT
(Filed December 6, 1976)



74 Civ. 5755
75 Civ. 229
75 Civ. 1736

The Objectors' application for a partial stay of judgment and order pending appeal is denied pursuant to the findings made at the hearing held on November 29, 1976.

SO ORDERED.

Charles H. Stewart
U.S.D.J.

December 3, 1976.

DEC 0 6 1976
MICROFILM

76-7578

NOTICE OF MOTION FOR CLARIFYING ORDER AND ORDER OF COURT DENYING MOTION (Filed December 1, 1976) (pp.427a-432a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
DEC 0 1 1976
S. D. OF N. Y.

EDWARD BRUCKER et al.,
Plaintiffs,

-- against --

THYSSEN-BORNEMISZA EUROPE N.V. et al.,
Defendants.

74 Civ. 5755 (CES)

place in

WILLIAM B. WEINBERGER,
Plaintiff,

-- against --

RICHARD J. POWERS et al.,
Defendants.

75 Civ. 229 (CES)

SHAMROCK CORPORATION et al.,
Plaintiffs,

-- against --

INDIAN HEAD INC. et al.,
Defendants

75 Civ. 1736 (CES)

NOTICE OF MOTION FOR AN ORDER CLARIFYING AND SUPPLEMENTING RECORD

TO: Shearman & Sterling
53 Wall Street
New York, New York 10005

Austrian, Lance & Stewart, P.C.
630 Fifth Avenue
Rockefeller Center
New York, N.Y. 10020

Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005

Weinstein & Levinson
11 Park Plaza
New York, N.Y. 10007

Richard J. Cutler, Esq.
c/o Indian Head Inc.
1211 Avenue of the Americas
New York, N.Y. 10036

Wolf, Haldenstein, Adler, Freeman, Herz & Frank
270 Madison Avenue
New York, N.Y. 10016

PLEASE TAKE NOTICE that the within proposed Motion for an Order Clarifying and Supplementing Record will be filed with and presented to the Honorable Charles E. Stewart, Jr., United States District Judge for the Southern District of New York, in Room 2602, United States Court House, 40 Centre Street, New York, New York, pursuant to Rule 60 of the Federal Rules of Civil Procedure, on November 24, 1976 at 3:00 P.M.

s/ Edwin P. Rome
EDWIN P. ROME
MORTON P. ROME

Attorneys for Morton P. Rome and Marjorie T. Rome, Trustees under Trust Agreement made November 22, 1954 for the benefit of Sally P. Rome, Objectors
Four Penn Center Plaza
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BRUCE A. HECKER
IRA POSTEL
SHEA, GOULD, CLIMENKO & CASEY
330 Madison Avenue
New York, N.Y. 10017
Telephone No. 212-661-3200

Dated: November 22, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER et al.,
Plaintiffs,

-- against --

THYSSEN-BORNEMISZA EUROPE N.V. et al.,
Defendants.

74 Civ. 5755 (CES)

WILLIAM B. WEINBERGER,
Plaintiff,

-- against --

RICHARD J. POWERS et al.,
Defendants.

75 Civ. 229 (CES)

SHAMROCK CORPORATION et al.,
Plaintiffs,

-- against --

INDIAN HEAD INC. et al.,
Defendants.

75 Civ. 1736 (CES)

ORDER FOR CLARIFICATION
AND SUPPLEMENTING OF
RECORD

This cause came on to be heard on Motion of Morton P. Rome and Marjorie T. Rome, Trustees under Trust Agreement made November 22, 1954, for the benefit of Sally P. Rome, Objectors, that the record in connection with the hearings on the Settlement of the captioned proceedings be clarified and supplemented as below set forth, and the Court upon consideration of the papers submitted and the argument of counsel and being fully advised, IT IS

ORDERED, that the parties to the Settlement in the captioned proceedings by their attorneys clarify and supplement the record therein by causing to be set forth specifically the following:

1. The names, addresses, and principal amounts owned by all holders of the 5 1/2% Convertible Subordinated Debentures, due April 15, 1993 of Indian Head Inc. who affirmatively consented to acceptance of the

said Settlement to and including October 18, 1976.

2. All original documents and papers evidencing the written consent of the said holders of the Convertible Debentures described above in Paragraph 1 hereof.

3. A certification by the Marine Midland Grace Trust Company of New York, Trustee under the Indenture, that said holders described above in Paragraph 1 hereof were such registered owners on the debenture register on August 2, 1976, and thereafter appeared as continuous owners thereof on the debenture register to and including October 18, 1976.

_____

United States District Judge

Dated:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER et al.,
Plaintiffs,

-- against --

74 Civ. 5755 (CES)

THYSSEN-BORNEMISZA EUROPE N.V. et al.,
Defendants.

WILLIAM B. WEINBERGER,
Plaintiff,

-- against --

75 Civ. 229 (CES)

RICHARD J. POWERS et al.,
Defendants.

SHAMROCK CORPORATION et al.,
Plaintiffs,

-- against --

75 Civ. 1736 (CES)

INDIAN HEAD INC. et al.,
Defendants

MOTION FOR AN ORDER
CLARIFYING AND SUPPLEMENTING RECORD

Pursuant to Rule 60 of the Federal Rules of Civil Procedure, Morton P. Rome and Marjorie T. Rome, Trustees under Trust Agreement made November 22, 1954 for the benefit of Sally P. Rome, ("Objectors"), move the Court for an Order that the record in connection with the hearings on the Settlement of the captioned proceedings be clarified and supplemented, and in support thereof set forth the following grounds:

1. Although this Court by its Memorandum, dated November 15, 1976 and Judgment and Order entered November 19, 1976 denied the

contentions of Objectors that only those owners of Convertible Debentures of Indian Head who affirmatively consented to the Settlement are bound thereby, Objectors intend timely to appeal therefrom.

2. In the event Objectors' contentions set forth in Paragraph 1 be considered by the appellate courts, it may become material and important for the appellate courts,as well as this Court, in the event of remand, to determine precisely the names, addresses and principal amounts owned by all holders of the said Convertible Debentures who affirmatively consented to acceptance of the said Settlement to and including October 18, 1976,and are bound thereby. This data may likewise become important for the parties to the said Settlement.

3. To the best of Objectors' knowledge and information, the record on this subject in the captioned proceedings is not clear and should therefore require clarification and be supplemented, so that the accurate status thereof may be ascertained for appellate court purposes as well as for this Court.

4. Such clarification and, if required, supplementation, will work no undue hardship upon the parties to this Settlement.

s/ Edwin P. Rome
EDWIN P. ROME
MORTON P. ROME

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DENIAL OF MOTION FOR ORDER CLARIFYING RECORD
(Filed December 6, 1976)

74 Civ. 5755
75 Civ. 229
75 Civ. 1736

The motion for an Order Clarifying and Supplementing the Record to include the names and addresses of the convertible debenture holders who affirmatively assented is denied, as it is inconsistent with our opinion. As to the two additional changes Objectors request in their memorandum of law, they are also denied. Our quotation of plaintiffs' affidavit is a direct quotation, and the letter from David J. Green and Co. states that they are the holders of $172,000 of Indian Head debentures.

SO ORDERED.

Charles E. Stewart
U.S.D.J.

December 3, 1976.

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TRANSCRIPT OF PROCEEDINGS OF NOVEMBER 29, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT FILED DEC 13 1976 S. D. OF N. Y.

EDWARD BRUCKER, DANIEL R. KAPLAN, etc.,

Plaintiffs,

vs.

THYSSEN-BORNEMISZA GROUP N. V. et al.,

Defendants.

74 Civ. 5755
75 Civ. 1736
75 Civ. 229

Before:

HONORABLE CHARLES E. STEWART, JR.,

District Judge.

New York, New York,
November 29, 1976.

Appearances:

AUSTRIAN, LANCE & STEWART, P.C.
Lead Counsel for Plaintiffs,
WILLIAM KLEIN II, ESQ., and
KEITH A. TAYLOR, ESQ.,
of Counsel.

WEINSTEIN & LEVINSON,
Attorneys for Plaintiff Weinberger
FRANK WEINSTEIN, ESQ., and
LAWRENCE SUCHAROW, ESQ.,
of Counsel.

WOLF, HALDENSTEIN, ADLER, FREEMAN, HERZ & FRANK,
Attorneys for Plaintiff Shamrock,
HARVEY M. SKLAVER, ESQ., of Counsel.

76-7574

Appearances (continued):

SHEARMAN & STERLING,
Attorneys for Certain defendants,
ROBERT BLANC, ESQ., and
ARNE HOVDESVEN, ESQ.,
of Counsel.

CRAVATH, SWAINE & MOORE,
Attorneys for certain Defendants,
ROBERT R. ROSENMAN, ESQ., and
ANTHONY A. DEAN, ESQ.,
of Counsel.

BLANK, ROME, KLAUS & COMISKY,
Attorneys for Objectors,
MORTON P. ROME, ESQ.
of Counsel.

(Case called.)

THE COURT: On the motion to clarify and supplement the record, I don't think I need any oral argument on that unless somebody has something earth shaking they want to tell me. If not, I propose to enter an endorsement order which reads as follows:

The motion for an order clarifying and supplementing the record to include the names and addresses of the convertible debenture holders who affirmatively assented is denied, as it is inconsistent with our opinion. As to the two additional changes objectors request in their memorandum of law, they are also denied. Our quotation of plaintiff's affidavit is a direct quotation, and the letter from David J.

Green & Co. states that they are the holders of $172,000 of Indian Head debentures. So ordered.

Now I'd like to hear about the motion for a stay.

Yes, Mr.Rome.

MR. ROME: Your Honor, my name is Morton Rome. I appear on behalf of the objectors in this proceeding. In connection with the motion to alter or amend judgment and order filed pursuant to Rule 59 (e) of the Federal Rules of Civil Procedure, we have filed such for two reasons:

One, in an abundance of caution, because of the possible interpretation of the words "prosecution of claim" may forbid the taking of an appeal.

THE COURT: Well, I don't think we need to argue about that one, Mr. Rome. If it can possibly be so interpreted, it certainly wasn't meant to do so.

MR. ROME: Thank you, sir.

THE COURT: And as far as I am concerned, you have a complete right to appeal.

MR. ROME: Thank you, sir. Then I will address myself to the second reason for the filing, namely, the permanent injunction from the prosecution of our civil action filed on November 16, 1976, three days before your Honor's judgment and order of permanent injunction.

Your Honor may recall that the August 2nd order

that was signed was an order which enjoined the prosecution of any actions arising out of the complaints in the proceedings under settlement except for actions that might be brought before your Honor. That appears, sir, in our motion to alter or amend.

THE COURT: Yes.

MR. ROME: Pursuant to that injunction, there was filed on behalf of objectors on November 16th a complaint in equity along with Taussig &Taussig who are owners of convertible debentures who opted out. That action in equity includes certain of the issues which were raised in the complaints settled by your Honor in his memorandum of November 15th and judgment and order.

We, sir, take the position that an action for an injunction is entitled to be tried on the merits. That is what the action filed on November 16, 1976 sought. A permanent injunction and a judgment approving a class action settlement is completely different, we submit, from a bar order which is provided for under rule 23 (c). The bar order in Rule 23 (c) has to do with the determination of res judicata. We submit, sir, that the bar order does not authorize the grant of a permanent injunction because in effect that would mean that a permanent injunction could be granted without a complete plenary trial on the merits. The very

purpose of a class action settlement as was cited in the original briefs filed by the proponents of the settlement, and as was cited in our brief in support of the motion to order or amend, is not to have a trial on the merits or even a dress rehearsal for the trial as set forth in Newman vs. Stein, but rather to allow your Honor, as the hearing judge, to determine whether the balance of the compromise represents a determination of reasonableness, fairness, and adequacy.

We submit, sir, that it does not authoritatively permit a preclusion order of an action already instituted for an injunction or even instituted thereafter, because such then would, we submit, violate the First Amendment right to petition for grievances which is inherent in the Bill of Rights and which has existed ever since 1689 in England, namely, the right to petition the government for a redress of grievances.

The action filed in 76 Civ. 5129 seeks squarely injunctive relief, and the Second Circuit Court of Appeals, as well as other authorities cited in our brief indicate specifically that no permanent injunction may be granted unless there be a full trial on the merits.

Secondly, in this particular case, as we said before, the bar order is a res judicata determination, and

it is the position of objectors that at the hearing before your Honor held on October 13th and October 18th, there was no evidence supporting the granting of a permanent injunction as contrasted with a bar order under Rule 23 (c). There is quite a difference, and we submit, sir, as set forth in the restatement of judgments, Section 116 --

THE COURT: What is the difference as a practical matter? If you didn't have the injunction, you are saying that class members could bring another lawsuit, but they would be bound, wouldn't they, by the bar order?

MR. ROME: No, sir, not necessarily, for the following reason --

THE COURT: They wouldn't be bound if it didn't cover them, of course.

MR. ROME: That's correct, sir, because --

THE COURT: But what is different because there is a permanent injunction?

MR. ROME: The difference is, sir, the hearing before your Honor on October 13th and October 18th was not a hearing on the merits.

THE COURT: Are you saying that therefore, because there was no hearing, as you put it, no hearing on the merits on October 13th and 18th, that the bar order is of no effect?

MR. ROME: The bar order is of no effect to an objector, or, as we contend, to those who did not affirmatively assent to --

THE COURT: That is a different point.

MR. ROME: No, sir, I believe in our submission, sir, it goes to the same point because we think that res judicata has to arise solely when the same --

THE COURT: Rule 23 says, whether you agree with the notion or not, that if you don't opt out, you are barred, you are in.

MR. ROME: Assuming, sir, that is what it says, it is the position of objectors that that may not procedurally abridge the rights of creditors who we contend were not adequately represented.

THE COURT: That is a question for the Court of Appeals.

MR. ROME: That is correct, sir, but our contention is that a bar order squarely is completely different from a plenary injunction or a permanent injunction. We say res judicata is generally decided by the second court in which the companion action is brought rather than the first court. In this particular case, the permanent injunction is issued in the first matter at a point of time after the companion action had been instituted. That in brief, sir --

THE COURT:Does that mean that the permanent injunction doesn't apply to the action which was brought earlier?

MR. ROME: In our submission, sir, it does not, but in order to --

THE COURT: Then what are we arguing about?

MR. ROME: Except, sir, that we do not care to risk violation of your Honor's order by continuing prosecution of that other action. This is why we brought this proceeding under 59 (e). We do not care to risk violation, and in all submission, sir, if your Honor in his wisdom feels that we are still entitled to prosecute, that is one thing.If your Honor feels that we are barred from prosecuting, that is another. That is the position --

THE COURT: I don't think that is something we have to decide here. That is a question which, it seems to me, ought to be decided in the second case. At least, that would be the appropriate forum to decide it.

MR. ROME: Yes, sir. We are fearful that if that second case, which joins both the objectors and one who opted out, proceeds, we would be possibly risking violation of this permanent injunction, which we do not care to do.

THE COURT: Is that correct, that that action does include opters-out as plaintiffs?

MR. ROME: Yes, it does. Taussig & Taussig

opted out on September 25th, sir, timely. That is the position on the motion to alter or amend, sir. If your Honor has any further questions on that, I will be glad to answer same.

THE COURT: I understand your position on the order, on that motion to alter and amend. I was interested in your position on the motion for a stay.

MR. ROME: Yes, sir.

THE COURT: And that is what you have been telling me.

MR. ROME: No.

THE COURT: All right.

MR. ROME: I just addressed myself --

THE COURT: All right, now would you tell me about your position on the motion for a stay.

MR. ROMES: Yes, sir. There are four tests, sir, that were set forth in our memorandum to determine whether a stay pending appeal may be granted in your Honor's discretion.

THE COURT: Yes.

MR. ROME: Under Federal Rule 8 (a) of the Rules of Appellate Procedure, the application ordinarily in the first instance must be made to your Honor. We submit, sir, that in connection with those four tests, as set forth in

the brief that we have filed, that the four tests have been met.

Test one is, and this appears from the seminal decision setting forth such tests in Virginia Petroleum Jobbers Association vs. Federal Power Commission, 259 Fed. 2nd, 921 at 925. The Court of Appeals of the District of Columbia, 1958, set forth on page 13 of the memorandum of objectors in support of such application for a partial stay. The first test, sir, is, has the petitioner made a strong showing that it is likely to prevail on the merits of the appeal?

There are several aspects to the showing that petitioners have made. Number one, sir, we do not believe that, and again this goes to the permanent injunction aspects, sir, that the bar order under Rule 23 (c) authorizes a preclusion order by way of permanent injunction. That, sir, would lend itself to a strong showing of the right to prevail on appeal.

Secondly, sir, in connection with the determination of the interpretation of the indenture, we say, sir, that the whole thrust of the interpretation of the proponents of the settlement deletes the factor of immediately prior to the merger, namely, Section 5.06 of the indenture. Under 5.06 of the indenture, sir, in the event of a merger, the

holder of convertible debentures have a right to convert into that class of secured shares of stock or other property -- and other property -- receivable upon the merger but immediately prior to the merger.

Now, immediately prior to the merger, as shown by the notice of November 19th of Indian Head, common stock holders could not have received cash; the cash was only existent and only will be existent after the effectiveness of the merger, with the result that the interpretation of 5.06 in effect states that immediately prior to the merger the debenture holders could receive cash. Cash, by the very nature of the settlement, sir, is not available and will not be available until after the effective date of the merger, which has been noticed for approximately November 30th.

We say, sir, that that too represents a strong showing that such interpretation as contained in your Honor's memorandum, and again which follows the petitioners' interpretation, constitutes a strong showing within the meaning of the case on the Court of Appeals of the District of Columbia.

Next, sir, it is our position, even though your Honor has disagreed, that the very nature of a class action settlement in this particular case abridges substantive

rights. We do not dwell further on that because your Honor disagrees, and we believe that is an appellate question.

We believe also, sir, and your Honor has likewise disagreed, that the very terms of the contracts of the convertible debenture owners specify that they are several in nature, and therefore, sir, they are governed by the laws of New York and they cannot be overridden procedurally by Rule 23. In this regard, sir, just recently under the Municipal Assistance case decided by the New York Court of Appeals, where an attempt was made to postpone the due date of New York bonds, that was held unconstitutional under state law in the face of a state statute which permitted the same. We say now a procedural device of a class action settlement which in turn on this point has to be governed by the laws of the state of New York, and therefore is not a federal question by a state substantive law question under Erie, cannot override the several rights of the contract holders. That does not appear in our brief, sir, because we just got a copy of the opinion.

Thirdly, sir, and this we consider rather important, the substitution of a fixed cash sum of money for a conversion right is quite different from the right to convert into common stock. We say, sir, this flies in the face of the Boeing vs. Van Gemert case decided by the Second Circuit.

Next, sir, we say, sir, that the fact that the convertible debentures were "alerted" by the wording of the subject to debenture itself is a misinterpretation because the adjustment clause referred to is not the merger clause but rather Section 5.04 if the indenture.

Nest, sir, we say that rather than being indistinguishable from the Green vs. Santa Fe case, this is a fortiori, because simply the rights of common stock were being affected. Here the rights of creditors are being affected. The SEC itself has stated in one of its rules that a convertible debenture produces a creditor's claim until the conversion privilege is exercised.

Next, sir, we say that, and again contrary to your Honor's opinion, that the securities laws were in fact violated, and this is our reasoning, sir. Your Honor's opinion on the subject stated, and I refer, sir, in this regard to page 19 where your Honor stated that the settlement agreement was clearly not an offer by TBI to sell securities . We say, sir, to the contrary, that it in fact is. The settlement agreement is a -- the notice of settlement is a prospectus within the definition of prospectus under the Securities Act of '33. We say, sir, that the notice of settlement is a two-fold, two-headed prospectus. Number one, it

seeks to offer to buy for cash; or, number two, if you hold the security, it seeks to substitute a substantially altered security for the existing convertible debenture. To that latter extent,sir, it constitutes an offer to sell a security, and we would point out, sir, to your Honor that that is exactly what Prof. Loss has stated in 1 Loss Securities Regulation at page 54. He points out, sir, that, for example, a change in conversion feature may be a substantial alteration of an existing security to constitute what they call a new security.

Secondly, we point out that as early as 1937 in the matter of Bankers Union Life Company, 2 SEC 63 at 73, the SEC interpreted a radical change in security's terms as a new security.

Thirdly, sir, in SEC vs. A.G. Bell Securities Corp., 171 Fed. Supp. 233, Southern District of New York, District Judge McGohey reaffirmed an SEC holding that a radical change,in that case in capital structure, made the new securities being offered entirely different and constituted an offer of securities.

Next, sir, we point out that even under the Public Utility Holding Company Act, in Minneapolis General Electric Company, 2 SEC 57, at 58-59, 1937, it was held that changes in an existing security where the trust indenture,

not the security, was materially altered, that was a change in a trust indenture just like in this particular case, that constituted a new security within the meaning of the Public Utility Holding Company Act.

Next, sir, in St. Lawrence Corporation Ltd. --

THE COURT: Mr. Rome, you don't need to go through the authorities which you say support your position and not mine.

MR. ROME: I will withdraw it then, and cease on that particular point, sir, and go to the next point.

Next, sir, on page 19, your Honor refers to Prof. Loss as saying that Section 5(c) obviously the legislative intent was not to preclude offers to buy for cash; but, sir, as we pointed out before, the notice of settlement is a double thing. While Section 5 (c) doesn't preclude it, the tender offer provisions of Section 14 and the filing provisions --

THE COURT: I am aware of your position on that.

MR. ROME: All right, sir.

Next, sir, 3(a) (10) --

THE COURT: Mr. Rome --

MR. ROME: If your Honor does not desire to hear any further --

THE COURT: So long as you are discussing the

question whether -- I take it you are still on the first of these four points?

MR. ROME: Yes, sir. I will go on to the second one.

THE COURT: I have considered your arguments, so unless you have something new to add, I prefer that you go ahead.

MR. ROME: All right, sir.

On the second point, the irreparable injury portion that is required for a showing in connection with a stay, or rather in this particular case a partial stay, has the petitioner shown that without such relief it will be irreparably injured? In our submission, sir, the failure of a stay will enable the start of the process of the scramble, and we say, sir, that in view of that, the proof of what might possibly be "adequate compensatory relief at a later date" might well then become speculative; and then, by reason of the lack of specificity of proof, such we say constitutes irreparable injury which may not be existent for money damages. That portion of our claim is set forth at pages 18 to 19 of our memorandum in support.

Next, sir, in connection with the third test, would the issuance of a stay substantially harm other parties interested in the proceedings, we say, sir, that we are seeking

a partial stay, and in this respect, sir, nothing would block those who have accepted the settlement from going forward and submitting their transmittal letters, having the same allowed, and being paid. Those are parties not affected by the partial stay that was being sought. It is the remaining convertible debentures, your Honor, who have not affirmatively consented, who may under the terms of the settlement itself and the mechanics, have their submission time extended to "such further time as the Court may allow." They, sir, in view of that, would not be prejudiced if they in fact desire to be affirmative written consenters, and hence, sir, even by the mechanics of the settlement on a expedited appeal, we feel that the determination as to whether objectors' position is right or not could well be determined. In fact, we have in mind, sir, a motion for a summary reversal in the Court of Appeals on this point, and we believe, sir, that we will get expedited treatment in that respect.

And finally, fourth, the fourth test, where lies the public interest? Objectors here are not objecting simply because of this particular Indian Head settlement. The particular objectors in question are a trust. There are other trusts in which large quantities of other convertible debentures are involved. We say, sir, that the effect of this

decision goes far beyond this case; that if by a merger squeeze-out, creditors' rights can be affected and a conversion period revised and altered, there are literally billions of dollars of convertible debentures that have the same identical terms as this, and any convertible debenture holder would thereby, if the convertible debenture sells for a discount below the redemption price, could be wiped out by a statutory merger at prices at the behest of the majority without any in-turn remedy. If he objects, under your Honor's preclusion order, there would be a permanent bar. If he opts out, he would be put to the long litigation, and these trusts are prepared, not because of only this case but because of others, to establish the finality of this point because we feel, sir, that convertible debentures then don't mean what they say if in fact the conversion privilege may be eliminated by this type of device.

Finally, sir, with respect to the public interest, if convertible debentures may be so adversely affected, then issuers whose stock is selling at a low ratio compared to its real value, will not be able to resort to "deferred equity financing," which is what a convertible debenture is, but will rather have to pay the going market rate of a fixed interest security, which is generally much higher.

We believe, sir, this affects literally billions of dollars and we believe, sir, this is a matter in which the agencies of government in charge of the capital markets of the country have a direct interest.

Therefore, we believe that as far as the public interest is concerned, it is more than present here.

That, sir, is the basis for our application for a partial stay pending appeal.

THE COURT: All right. Mr. Klein?

MR. KLEIN: Your Honor, I will not take up much of your time. I am not sure that any mention has been made of what I believe to be the case, that Rule 23 prior to 1966 provided that in order to accept a settlement, a member of the class had to affirmatively state so, and of course the rule was changed in 1966 so as to provide exactly the reverse.

I'd just like to briefly make the following points, namely, that counsel has made all the arguments before, and your Honor has rejected them. I don't know that he offers a single reason as to why he should be more successful on appeal than he was successful before your Honor. I don't know that he offers a single reason for a stay, which obviously will have an adverse effect on the common stock and the warrants, which he does not mention.

He's really had three swings, your Honor. His first

swing at the bat was with his previous objection. The second swing was this complaint, which is a transmutation of his brief into a complaint point for point. And now he is seeking a third swing with the same kinds of arguments. And therefore, since we have responded to them, and you have responded to them, I see no reason for me to burden the record.

With regard to the irreparable injury and four tests, counsel comes up with really what he did at the hearing. He talks about millions of dollars being affected. He never produced an affidavit to this effect. He never disputed the fact, and it is in the record here, that I think there are at least four convertible debentures operating under this type of indenture, almost word for word. They are listed on the New York Stock Exchange, all four of them. They are convertible now into cash.

The irreparable injury here, as your Honor knows, there is a real irreparable injury here, and it is every day there is a delay here, there is an injury not to the debenture holders but to the common stock holders and the warrant holders, and the terrible, terrible effect, leaving aside the delay, the terrible effect on the market, because there is no market, and the market was, as your Honor will recall, something like $15 to $20 on common stock. Is that

what counsel wants? Do you want a stay so we can go back to a $20 common stock? The debentures were trading at $45 to $50. Is that what he wants? He wants us to go back to a $45 to $50 debenture in the name of an immutable contract right for which he offers no authority.

And of course the same thing with regard to the warrants. They were trading at a dollar.

Therefore, your Honor, I think there is no basis, he offers no new arguments.

I think one final thing for the record. We received these papers this morning.

And also just in passing and for the record, I mentioned it before at the haring, and I mention it again, particularly this morning, Mr. Rome is the objectant, and he is also a plaintiff, he is also a lawyer. This morning he is no longer represented by his brother, a lawyer, but he is representing himself. He's brought an action where he is a plaintiff or he has a right to opt out, and that is the whole nature of Rule 23, so I really don't understand this whoe injunction business, I don't understand the whole argument. If he wanted to bring an action, he should have opted out. The notice is very clear. I would like to read it into the record. It's not the only time that counsel has misquoted the notice. Paragraph 24 of the notice says:

"A class member making a request for exclusion will not share in the benefits of the settlement, will not be bound by any judgment entered in the above captioned action, and will be able to pursue the member's individual claim, if any." But apparently counsel is not satisfied with pursuing an individual claim. He wants to have a class action claim despite the fact that Rule 23 was designed for the opposite effect.

And finally, as far as the injunction is concerned, the whole function of Rule 23 in class action settlements, and obviously I don't have to make much of a lecture on this, is to save litigation. The whole point is to bind the class provided that everyone who wants to can opt out. Nobody here, or very few indeed, did opt out. Under those circumstances counsel here is seeking as a lawyer and as a plaintiff to have his cake and eat it too, and I submit that is no basis for a stay.

Thank you, your Honor.

MR. SKLAVER: Your Honor, I would only like to elaborate one little bit on what Mr. Klein said with respect to the warrant holders and the stockholders. The longer this settlement is delayed, the effectuation of the settlement, the longer those people will be in a locked-in position without interest on their money. If there is a stay pending appeal,

and if the appeal takes, even expedited, six to eight months between perfection and decision, those people are going to be without interest on their money for six to eight months. They are getting a fixed sum. They are not getting any interest as the debenture holders will be receiving interest, until they finally receive their money.

In that regard, the amount of money allocable to the warrant holders and the stockholders,according to my calculations, is close to about $20 million. I am not aware thatwithin the framework of this settlement your Honor has the power to stay the effect of judgment without the objectants posting an undertaking as required by Rule 62 (d) of the Federal Rules of Civil Procedure. There are instances when the judgment can be stayed without the undertaking. As I read Rule 62, I do not believe that this is one of those cases.

Finally, and perhaps most importantly, the settlement agreement, the stipulation provides that if there is a stay, TBI has the option of terminating the settlement, rejecting it and going back to the lawsuit. I am not aware at the moment that TBI so intends. My personal feeling would be that TBI today would not walk away from the settlement, but I don't know what would happen six months from now, your Honor, while this is pending, while there is

an appeal pendi , and there is that possibility which will exist if the judgment is stayed. Thank you.

THE COURT: Thank you. Mr. Blanc, do you have anything?

MR. BLANC: Your Honor, I won't add anything oral.

MR. WEINSTEIN: If your Honor please, I have appeared in many cases as lead counsel, class suits as well as derivative suits. Similar questions of law were raised previously. The Court has the power, and so held by the Second Circuit Court of Appeals, to overrule on questions of law even if it is debatable by a settlement. That was done in this particular case. I see no merit to any of the objections raised by Mr. Rome, and I suggest that all his motions be denied.

THE COURT: Thank you. Mr. Rome, one question. On the question of irreparable harm, I am puzzled as to why money damages aren't available here in adequate amount to make you whole. Isn't the figure $1,033 significant in terms of money damages?

MR. ROME: No, sir, for the following reasons, sir:

If, for example, the trust desired to convert and to share the common stock, the 25,974 shares of common stock of Indian Head may be worth far more than $1,033, which is why, according to Boeing vs. Van Gemert an individual investor

would normally invest in convertible debentures, not to seek the amount of the debt, because the amount of the debt bears five and a half percent interest, but rather the expectation that the common stock value will rise beyond that, sir. In that connection, your Honor may recall that we asked the business purpose at one of the hearings. The reply was, "Well, it is the Thyssen proposal perhaps, to change the nature of the business so that they would invest in or cause Indian Head to pursue ventures that might be much more 'speculative' than would otherwise be the case."

THE COURT: What about that, Mr. Blanc? What do you this about this position?

MR. BLANC: Sir,I don't think there was any such statement made on the record previously. The point that I was making on the record previously was that the absence of a public common stock interest would remove potential claims of conflict or of disputes over the prudence of events down the road; but my client has no intention at the moment of changing the business of Indian Head.

THE COURT: What do you think about the irreparable harm, irreparable injury point?

MR. BLANC: Well, I don't imagine that there is any irreparable injury here that can't be compensated in damages,

your Honor. It's always possible to place a value on a given right depending on the situation at the time. In fact, that's really what was done by the experts in this case when they offered their opinions as to the value of Indian Head for purposes of a $32 price, and that type of thing is rather common in cases of this sort.

THE COURT: Yes, Mr. Rome?

MR. ROME: may I just add one word, sir?

THE COURT: Yes.

MR. ROME: Your Honor may well take notice of the fact that in the case of Shell Oil there is, I believe, one or two outstanding shares in that giant company, which one or two shares are worth incalculable moneys, and they have never been able to be bought. The same thing is true in connection with Western Electric Corporation, sir, where there are outstanding a small fraction of common stock.

Again, sir, in this particular case the value is in hundreds and hundreds of dollars, much more than the norm. I point that out to you, sir.

MR. KLEIN: Your Honor, on that irreparable injury, I think it ought to be on the record, it may have been before the hearing, that there can't be irreparable injury even on the point of the common stock because the subsidiary corporation into which Indian Head will be merged assuming that

on appeal there were to be a reversal and a court were to order that the convertible debenture owners shall have a right to convert into common stock, that company could always issue common stock and the convertible debentures would then convert into it; so even if it weren't a question of dollars, which I believe it is, and of course, you know, as far as the redemption is concerned, no one has gone around trying to redeem. The whole point in Boeing was that there was a tremendous dollar difference between the redemption in Boeing and the market price. Here, on the contrary, the common stock was $22 or $24 and nobody, including Mr. Rome, ever redeemed; so I think -- ever converted. So I think you have both the fact that the company can redeem at $1,033 this year and that redemption price, your Honor, goes down, so every year it gets less. And also, if the Court of Appeals were to so order, or the United States Supreme Court, the subsidiaries could always issue common stock.

Thank you.

THE COURT: All right, gentlemen, I'd like to take about five minutes.

(Recess.)

THE COURT: Mr. Rome, I am going to deny each of your motions. I have already indicated my ruling on the first

motion. With respect to the motion to alter or amend, a couple of points. The fact that a permanent injunction was in the offing here, of course, has been a matter of record since the notice was sent out pursuant to the order of August 2; and in any event, it seems to me that my opinion sets forth my reasoning, my findings, my conclusions.

On the application for a partial stay, with respect to the four factors which you all agree need to be considered here, you rely upon, as you have indicated, the same points which you made at the hearings, and which you briefed fully, to demonstrate your position that there is a likelihood of success on appeal.

Well, I have considered your points, and I have ruled against you, and I see no reason to change my mind, so I cannot agree thatyou have made a strong showing that you are likely to succeed on the merits on appeal.

Also, I can't agree with your position on irreparable harm. It seems to me you can be adequately compensated by monetary damages if it comes to that. I am not sure I need to reach the third and fourth points, having reached those conclusions as to the first two, but in any event, I think a stay here would substantially harm the other parties to the litigation. They would continue to be locked-in and

could lose substantial amounts of interest if a stay were entered.

Finally, as to public interest,I believe that the public interest argument is particularly applicable to questions involving regulatory matters, which is not significantly important here, if indeed it has any bearing on this matter.

Just to remove any doubts about whether or not you have the right to appeal, I have stated it once, I will state it again, as far as I am concerned, you have a complete right to appeal. Do we need to formalize that any further?

MR. ROME: No, sir, I accept that, and may I ask on additional question, sir?

THE COURT: Yes.

MR. ROME: There is in process of being served the complaint in the earlier action, 76-5129. If I represent to your Honor that until the disposition of the appeal which we intend immediately to file the service will continue on behalf of Taussig & Taussig and thereby not interfere with your Honor's permanent injunction, in that respect would your Honor permit that?

THE COURT: Serving the papers on behalf of the objectors?

MR. ROME: That's correct.

MB

MR. BLANC: No, your Honor, I don't believe that is correct. Taussig & Taussig are the purported opt-outs.

THE COURT: I certainly have no objection to that.

MR. ROME: Even though the caption of the case --

THE COURT: I remember the first name is Rome.

MR. ROME: That's right, sir.

THE COURT: What do you think about that, Mr. Blanc? You were on your feet. Do you have any objection to what he is just saying?

MR. BLANC: Perhaps I should have remained seated, your Honor.

We certainly wouldn't take a position adverse to the filing, serving a complaint on behalf of someone who as far as we can tell without yet having investigated the matter purports to have requested exclusion. Our whole problem, much as the Court's, I suspect, would be any proceeding on behalf of someone who merely objected.

THE COURT: That seems appropriate to me. Does anybody else feel any differently about it? Mr. Klein?

MR. KLEIN: Not on the basis of the information I have now, your Honor.

THE COURT: All right. Then I guess you have your answer, Mr. Rome.

MR. ROME: Thank you, sir. May I treat, sir, this

record as your findings of fact and conclusions of law under Rule 52 (a) with respect to our application for partial stay?

THE COURT: Yes.

MR. ROME: Thank you, sir.

THE COURT: All right. Anything else, gentlemen? Thank you very much.

- 0 -

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Official Court Reporter
U. S. District Court

NOTICE OF APPEAL (Filed November 29, 1976)
UNITED STATES DISTRICT COURT (pp. 465a-466a)
SOUTHERN DISTRICT OF NEW YORK

465a

EDWARD BRUCKER, et al.,
Plaintiffs,

-- against --

THYSSEN-BORNEMISZA EUROPE N.V.,
Defendants.

74 Civ. 5755 (CES)

WILLIAM B. WEINBERGER,
Plaintiff,

-- against --

RICHARD J. POWERS, et al.,
Defendants.

75 Civ. 229 (CES)

SHAMROCK CORPORATION, et al.,
Plaintiffs,

-- against --

INDIAN HEAD INC., et al.,
Defendants.

75 Civ. 1736 (CES)

NOTICE OF APPEAL

Notice is hereby given that Morton P. Rome and Marjorie T. Rome, Trustees under Trust Agreement made November 22, 1954 for the benefit of Sally P. Rome ("Objectors"), hereby appeal to the United States Court of Appeals for the Second Circuit from the Final Judgment entered in this action on the 19th day of November, 1976.

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JUDGE STEWART'S CHAMBERS

OBJECTORS EXHIBIT - INDIAN HEAD INDENTURE
(pp. 467a-578a)

[CONFORMED COPY]

INDIAN HEAD INC.

AND

MARINE MIDLAND GRACE TRUST COMPANY
OF NEW YORK,
AS TRUSTEE

Indenture

Dated as of April 15, 1968

5½% Convertible Subordinated Debentures
due April 15, 1993

103L

INDIAN HEAD INC.

Cross-reference sheet pursuant to paragraph 4(c) of Instructions as to Exhibits to Form S-1 showing the location in the Indenture of the provisions inserted pursuant to Sections 310 to 318(a), inclusive, of the Trust Indenture Act of 1939.

Sections of Trust Indenture Act	Sections of Indenture
310(a)	6.03 and 9.09
310(b)	9.08 and 9.10
310(c)	Not applicable
311(a)	9.13(a) and 9.13(c)
311(b)	9.13(b)
311(c)	Not applicable
312(a)	7.01 and 7.02(a)
312(b)	7.02(b)
312(c)	7.02(c)
313(a)	7.04(a)
313(b)	7.04(b)
313(c)	7.04(c)
313(d)	7.04(d)
314(a)	7.03
314(b)	Not applicable
314(c)	16.06
314(d)	Not applicable
314(e)	16.06
315(a)	9.01
315(b)	8.07
315(c)	9.01
315(d)	9.01
315(e)	8.08
316(a)	8.01, 8.06 and 10.04
316(b)	8.04
317(a)	8.02
317(b)	6.04
318(a)	16.07

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THIS INDENTURE, dated as of April 15, 1968, between INDIAN HEAD INC., a corporation organized and existing under the laws of the State of Delaware (hereinafter sometimes called the "Company"), and MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK, a corporation organized and existing under the laws of the State of New York (hereinafter sometimes called the "Trustee").

WITNESSETH:

WHEREAS the Company is empowered to borrow money and issue debentures for any of its objects and purposes; and

WHEREAS for its lawful corporate purposes the Company has duly authorized an issue of 5½% Convertible Subordinated Debentures due April 15, 1993 (hereinafter referred to as the "Debentures"), in an aggregate principal amount not to exceed $25,000,000, to be issued under and pursuant to the provisions hereof; and

WHEREAS the definitive Debentures and the Trustee's certificate of authentication to be indorsed on the Debentures are to be substantially in the following forms:

[FACE]

No. $

INDIAN HEAD INC.

5½% CONVERTIBLE SUBORDINATED DEBENTURE
DUE APRIL 15, 1993.

INDIAN HEAD INC., a corporation duly organized and existing under the laws of the State of Delaware (herein referred to as the "Company"), for value received, hereby promises to pay to , or registered assigns, at its agency in the Borough of Manhattan, The City of New York, State of New York, Dollars on Aprii 15, 1993, in such coin or currency of the United States of America as at the time of payment shall be legal tender for the payment of public and private debts, and to pay

interest thereon from the 15th day of April or October next preceding the date hereof to which interest has been paid (unless the date hereof is an April 15 or October 15 to which interest has been paid, in which case from the date hereof, or unless the date hereof is prior to October 15, 1968, in which case from April 15, 1968), at the rate of 5½% per annum, in like coin or currency, at said agency on the 15th day of April and the 15th day of October in each year, until payment of said principal sum has been made or duly provided for. Such interest will (subject to certain exceptions provided for in the Indenture hereinafter referred to) be paid to the holder of record of this Debenture, or the Debenture in exchange or substitution for which this Debenture shall have been issued, at the close of business of the last business day occurring prior to 15 days next preceding such April 15 or October 15.

The provisions of this Debenture are continued on the reverse hereof and such continued provisions shall for all purposes have the same effect as though fully set forth at this place.

This Debenture shall not be valid or become obligatory for any purpose until the certificate of authentication hereon shall have been signed by the Trustee under the Indenture.

IN WITNESS WHEREOF, INDIAN HEAD INC. has caused this Debenture to be signed in its name by the facsimile signature of its President or one of its Vice Presidents and its corporate seal, or a facsimile thereof, to be impressed or imprinted hereon, attested by the facsimile signature of its Secretary or one of its Assistant Secretaries.

Dated

INDIAN HEAD INC.

By .....
President.

Attest:

.....
Secretary.

3

[FORM OF TRUSTEE'S CERTIFICATE OF AUTHENTICATION]

This is one of the Debentures described in the within-mentioned Indenture.

MARINE MIDLAND GRACE TRUST
COMPANY OF NEW YORK as Trustee

By .....
Authorized Officer.

4

[REVERSE]

INDIAN HEAD INC.

5½% CONVERTIBLE SUBORDINATED DEBENTURE
DUE APRIL 15, 1993

This Debenture is one of a duly authorized issue of Debentures of the Company, designated as its 5½% Convertible Subordinated Debentures due April 15, 1993 (herein referred to as the "Debentures"), limited to the aggregate principal amount of $25,000,000, all issued or to be issued under and pursuant to an indenture, dated as of April 15, 1968 (herein referred to as the "Indenture"), duly executed and delivered by the Company to Marine Midland Grace Trust Company of New York, as Trustee (herein referred to as the "Trustee"), to which Indenture and all indentures supplemental thereto reference is hereby made for a description of the rights, duties and immunities thereunder of the Trustee and the Company and the nature and extent of the rights of the holders of the Debentures.

The indebtedness evidenced by the Debentures is, to the extent provided in the Indenture, subordinate and subject in right of payment to the prior payment in full of all Senior Indebtedness, as defined in the Indenture, and this Debenture is issued subject to the provisions of the Indenture, and each holder of this Debenture, by accepting the same, agrees to and shall be bound by such provisions.

Subject to the provisions of the Indenture, the holder hereof has the right, at his option at any time prior to maturity (except that, in case this Debenture shall be called for redemption before maturity, such right shall terminate at the close of business on the second business day prior to the date fixed for redemption of this Debenture unless the Company shall default in payment due upon such redemption), to convert this Debenture into fully paid and non-assessable shares of Common Stock of the Company at the conversion rate of 25.974 shares of Common Stock for each $1000 principal amount of Debentures, subject to such adjustment, if any, of the conversion rate and the securities or other property issuable upon conversion as may be required by the provisions of the Indenture, but only upon surrender of this Debenture for the purpose of such conversion to the Company at the office

or agency to be maintained by the Company in the Borough of Manhattan, The City of New York, State of New York, and accompanied (i) if required by the Company, by a proper assignment hereof in blank and (ii) if surrendered for conversion after the record date for payment of interest on Debentures and before the date for payment of such interest, by funds in an amount equal to the interest which would have been payable on the principal amount hereof (which has not been called for redemption during such period) so surrendered for conversion had the same not been so surrendered for conversion, all in accordance with the terms and provisions of the Indenture. No fractional shares are issuable upon any conversion, but in lieu thereof the Company shall pay therefor in cash as provided in the Indenture. There will be no adjustment in respect of interest or dividends upon conversion of this Debenture.

In case an Event of Default, as defined in the Indenture, shall have occurred and be continuing, the principal of all the Debentures may be declared, and upon such declaration shall become, due and payable, and such declaration may in certain events be rescinded, in the manner, with the effect and subject to the conditions provided in the Indenture.

No reference herein to the Indenture and no provision of this Debenture or of the Indenture shall alter or impair the obligation of the Company, which is absolute and unconditional, to pay the principal of and interest on this Debenture at the place, at the respective times, at the rate and in the currency herein prescribed.

The Indenture contains provisions permitting the Company and the Trustee, with the consent of the holders of not less than 66⅔% in aggregate principal amount of the Debentures at the time outstanding, evidenced as in the Indenture provided (and in certain instances without such consent), to execute supplemental indentures adding any provisions to or changing in any manner or eliminating any of the provisions of the Indenture or of any supplemental indenture or modifying in any manner the rights and obligations of the holders of the Debentures and of the Company; *provided, however,* that no such supplemental indenture shall (i) extend the fixed maturity of any of the Debentures, or reduce the principal amount thereof, or reduce the rate or extend the time of payment of interest

thereon, or reduce any premium payable upon the redemption thereof, or alter or impair the right to convert the same into shares of Common Stock at the rates and upon the terms provided in the Indenture, without the consent of the holder of each Debenture so affected or (ii) reduce the aforesaid percentage of Debentures, the holders of which are required to consent to any such supplemental indenture, without the consent of the holders of all Debentures then outstanding. Any such consent by the holder of this Debenture shall be conclusive and binding upon such holder and upon all future holders and owners of this Debenture and of any Debenture issued in exchange herefor or in place hereof, irrespective of whether or not any notation of such consent is made upon this Debenture.

As provided in the Indenture, the Debentures may be redeemed, at the option of the Company, as a whole or from time to time in part, at any time, upon the notice referred to below, at the following Regular Redemption Prices (expressed in percentages of the principal amount thereof), together, in each case, with interest accrued to the date fixed for redemption: if redeemed during the 12 months' period beginning April 15:

1968	105.50%	1978	102.75%
1969	105.22%	1979	102.47%
1970	104.95%	1980	102.20%
1971	104.67%	1981	101.92%
1972	104.40%	1982	101.65%
1973	104.12%	1983	101.37%
1974	103.85%	1984	101.10%
1975	103.57%	1985	100.82%
1976	103.30%	1986	100.55%
1977	103.02%	1987	100.27%

and if redeemed on or after April 15, 1988, at 100%.

The notice of redemption to the holders of Debentures to be redeemed shall be given by mailing a copy of such notice not later than the thirtieth day, and not earlier than the sixtieth day, before the date fixed for redemption to the registered holders of Debentures to be redeemed at their last addresses as they shall appear on the registration books of the Company, all as provided in the Indenture.

The Debentures are also subject to redemption in part through the operation of the sinking fund provided for in the Indenture on April 15, 1979, and on each April 15 thereafter to and including April 15, 1992, on notice as set forth above, at 100% of the principal amount thereof, together, in each case, with interest accrued to the date fixed for redemption.

The Debentures are issuable as registered Debentures in denominations of $1,000 and any multiple thereof. This Debenture is transferable by the registered holder hereof, in person or by duly authorized agent or legal representative, on the books of the Company to be kept for that purpose at an agency to be maintained by the Company in the Borough of Manhattan, The City of New York, State of New York, upon surrender and cancelation of this Debenture and upon presentation of a duly executed written instrument of transfer, and thereupon a new Debenture or Debentures of authorized denominations for the same aggregate principal amount will be issued to the transferee or transferees in exchange herefor; and this Debenture, with or without others, may in like manner be exchanged for one or more Debentures of other authorized denominations but of the same aggregate principal amount.

The Company, the Trustee, any paying agent, any conversion agent and any Debenture registrar may deem and treat the registered holder hereof as the absolute owner of this Debenture (whether or not this Debenture shall be overdue and notwithstanding any notice of ownership or writing hereon made by anyone other than the Company or any Debenture registrar) for the purpose of receiving payment hereof or on account hereof (subject to the provisions of the first paragraph appearing on the face hereof) and for all other purposes, and neither the Company nor the Trustee nor any paying agent nor any conversion agent nor any Debenture registrar shall be affected by any notice to the contrary.

No recourse shall be had for the payment of the principal of (or premium, if any) or the interest on this Debenture, or for any claim based hereon, or otherwise in respect hereof, or based on or in respect of the Indenture or any indenture supplemental thereto, against any

incorporator, stockholder, officer or director, past, present or future, as such, of the Company or of any predecessor or successor corporation, whether by virtue of any constitution, statute or rule of law or equity, or by the enforcement of any assessment or penalty or otherwise, all such liability being, by the acceptance hereof and as part of the consideration for the issuance hereof, expressly waived and released by every holder or owner hereof, as more fully provided in the Indenture.

AND WHEREAS all acts and things necessary to make the Debentures, when executed by the Company and authenticated and delivered by the Trustee as in this Indenture provided, the valid, binding and legal obligations of the Company, and to constitute these presents a valid indenture and agreement, have been done and performed, and the execution of this Indenture and the issuance hereunder of the Debentures have in all respects been duly authorized, and the Company, in the exercise of the legal right and power in it vested, executes this Indenture and proposes to make, execute, issue and deliver the Debentures;

NOW, THEREFORE:

In order to declare the terms and conditions upon which the Debentures are to be executed, authenticated, issued and held, and in consideration of the premises, of the purchase and acceptance of the Debentures by the holders thereof and of the sum of one dollar to it duly paid by the Trustee at the execution of these presents, the receipt whereof is hereby acknowledged, the Company covenants and agrees with the Trustee for the equal and proportionate benefit of the respective holders from time to time of the Debentures as follows:

ARTICLE ONE

DEFINITIONS

SECTION 1.01. The terms defined in this Section (except as in this Indenture otherwise expressly provided or unless the context other-

wise requires) for all purposes of this Indenture and of any indenture supplemental hereto shall have the respective meanings specified in this Section. All other terms used in this Indenture which are defined in the Trust Indenture Act of 1939 or which are by reference in such Act defined in the Securities Act of 1933 (except as herein otherwise expressly provided or unless the context otherwise requires) shall have the meanings assigned to such terms in said Trust Indenture Act and in said Securities Act as in force at the date of the execution of this Indenture.

Authorized Newspaper:

The term "Authorized Newspaper" shall mean a newspaper printed in the English language and customarily published at least once a day for at least five days in each calendar week (whether or not published on Saturdays, Sundays or legal holidays) and of general circulation in the Borough of Manhattan, The City of New York, State of New York. If, because of the temporary or permanent suspension of the publication or general circulation of any newspaper, it is impossible or impracticable to publish any notice required by this Indenture in a newspaper which comes within the term "Authorized Newspaper" as hereinbefore defined, the term "Authorized Newspaper" shall include such mode of communication as shall be adopted or approved by the Trustee.

Board or Board of Directors:

The terms "Board" or "Board of Directors" shall mean the Board of Directors of the Company or the Executive Committee thereof.

Business day:

The term "business day" shall mean each Monday, Tuesday, Wednesday, Thursday and Friday which is not a legal holiday in the State of New York or is not a date on which banking institutions in The City of New York are authorized by law to close.

Common Stock:

The term "Common Stock" shall mean (i) the class of stock designated as the common stock of the Company at the date of this Indenture, or (ii) any other class of stock resulting from successive changes or reclassifications of such common stock consisting solely of changes in par value, or from par value to no par value, or from no par value to par value.

Company:

The term "Company" shall mean Indian Head Inc., a Delaware corporation, and, subject to the provisions of Article Thirteen, shall also include its successors and assigns.

Corporation:

The term "corporation" shall include, except for the purposes of Section 13.01, an association, joint stock company, business trust or other similar organization.

Debenture or Debentures:

The terms "Debenture" or "Debentures" shall mean any Debenture or Debentures, as the case may be, authenticated and delivered under this Indenture.

The term "outstanding", when used with reference to Debentures, shall mean, subject to the provisions of Section 10.04, as of any particular time, all Debentures theretofore authenticated and delivered by the Trustee under this Indenture, except

(a) Debentures theretofore cancelled by the Trustee or delivered to the Trustee cancelled or for cancelation;

(b) Debentures for the payment or redemption of which moneys in the necessary amount shall have been deposited in trust with the Trustee or with any paying agent (other than the Company); *provided, however,* that if such Debentures are to be redeemed prior to the maturity thereof, notice of such redemption shall have been given as in Article Four provided or provision satis-

factory to the Trustee shall have been made for giving such notice; and

(c) Debentures in lieu of or in substitution for which other Debentures shall have been authenticated and delivered pursuant to the terms of Section 2.07, unless proof satisfactory to the Trustee is presented that any such Debentures are held by holders in due course.

Debentureholder:

The terms "Debentureholder", "holder of Debentures", "holder", or other similar terms used in respect of the Debentures shall mean any person who shall at the time be the registered owner of any Debenture.

Event of Default:

The term "Event of Default" shall mean any event specified in Section 8.01 continued for the period of time, if any, therein designated.

Indenture:

The term "Indenture" shall mean this instrument as originally executed or, if amended or supplemented, as so amended or supplemented.

Officers' Certificate:

The term "Officers' Certificate" shall mean a certificate signed by the Chairman of the Board or the President or a Vice President and by the Treasurer or an Assistant Treasurer or the Secretary or an Assistant Secretary of the Company. Each such certificate shall include the statements provided for in Section 16.06, if and to the extent required by the provisions thereof.

Opinion of Counsel:

The term "Opinion of Counsel" shall mean an opinion in writing signed by legal counsel who shall be satisfactory to the Trustee and who may be an employee of or counsel to the Company. Each such opinion shall include the statements provided for in Section 16.06, if and to the extent required by the provisions thereof.

Person:

The term "person" shall mean an individual, a corporation, a partnership, a trust, an unincorporated organization or a government or any agency or political subdivision thereof.

Preferred Stock:

The term "Preferred Stock" shall mean any stock of the Company, whether now or hereafter outstanding, entitled by its terms to a preference upon a distribution of assets in liquidation or dissolution.

Responsible Officer:

The term "Responsible Officer", when used with respect to the Trustee, shall mean the chairman of the board of directors or trustees, the vice chairman of the board of directors or trustees, the chairman of the executive committee, the vice chairman of the executive committee, the chairman of the trust committee, the president, any vice president, the cashier, the secretary, the treasurer, any trust officer, any assistant trust officer, any assistant vice president, any assistant cashier, any assistant secretary, any assistant treasurer, or any other officer or assistant officer of the Trustee customarily performing functions similar to those performed by the persons who at the time shall be such officers, respectively, or to whom any corporate trust matter is referred because of his knowledge of and familiarity with the particular subject.

Senior Indebtedness:

The term "Senior Indebtedness" shall mean the principal of, premium, if any, and interest on (a) all indebtedness of the Company for money borrowed by the Company (other than the Debentures and the 5½% Subordinated Debentures due May 15, 1990, issued under an Indenture dated as of May 15, 1965, between the Company and Chemical Bank New York Trust Company, as Trustee), whether short-term or long-term and whether secured or unsecured, (b) pur-

chase money obligations evidenced by notes or similar instruments for property and equipment purchased by the Company, whether secured or unsecured, and (c) renewals, extensions, refundings, amendments and modifications of any such indebtedness, unless by the terms of the instruments creating or evidencing such indebtedness or such renewal, extension, refunding, amendment or modification it is provided that such indebtedness in question is not superior in right of payment to the Debentures.

Subsidiary:

The term "Subsidiary" shall mean any corporation the majority of the shares of stock of which at the time outstanding having voting power for the election of directors, either at all times or only so long as no senior class of stock has such voting power because of default in dividends or because of the existence of some other default, is owned directly or indirectly by the Company or by one or more of its other Subsidiaries or by the Company in conjunction with one or more of its other Subsidiaries.

Trustee:

The term "Trustee" shall mean the Trustee under this Indenture for the time being, whether original or successor.

Trust Indenture Act of 1939:

The term "Trust Indenture Act of 1939", subject to the provisions of Sections 12.01 and 12.02, shall mean the Trust Indenture Act of 1939 as in force at the date of execution of this Indenture.

ARTICLE TWO

Issuance, Description, Transfer and Exchange of Debentures

Section 2.01. The Debentures shall be designated as 5½% Convertible Subordinated Debentures due April 15, 1993. Debentures not to exceed the aggregate principal amount of $25,000,000, except as

provided in Sections 2.05, 2.06, 2.07, 4.07, 5.01 and 12.04, may, upon the execution of this Indenture and from time to time thereafter, be executed by the Company and delivered to the Trustee for authentication, and the Trustee shall thereupon, subject to the limitations specified in this Section, authenticate and deliver the principal amount of said Debentures so delivered to it to or upon the written order of the Company (signed by its President or a Vice President and by its Treasurer or an Assistant Treasurer or by its Secretary or an Assistant Secretary) without further action by the Company.

SECTION 2.02. The Debentures and the Trustee's certificate of authentication to be borne by the Debentures shall be engraved, lithographed or printed with engraved borders and substantially of the tenor and purport as in this Indenture hereinbefore recited and may have such letters, numbers or other marks of identification or designation and such legends or endorsements engraved, lithographed or printed thereon as the Company may deem appropriate and as are not inconsistent with the provisions of this Indenture, or as may be required to comply with any law or with any rule or regulation made pursuant thereto or with any rule or regulation of any stock exchange on which the Debentures may be listed, or to conform to usage.

SECTION 2.03. The Debentures shall be issuable as registered Debentures without coupons in denomination of $1,000 and any multiple thereof. The Debentures shall mature April 15, 1993, and shall bear interest at the annual rate set forth in the title thereof, payable semi-annually on April 15 and October 15 in each year. Every Debenture shall be dated the date of its authentication. Except as provided in the next succeeding paragraph, every Debenture shall bear interest from the next preceding April 15 or October 15 to which interest has been paid (unless such date of authentication falls on an April 15 or October 15 to which interest has been paid, in which case it shall bear interest from such date of authentication, or unless such date is prior to October15, 1968, in which case such interest shall be payable from April 15, 1968).

The person in whose name any Debenture is registered at the close of business on any record date (as hereinafter defined) with respect to any interest payment shall be entitled to receive the interest payable on the applicable interest payment date notwithstanding the cancelation of such Debenture upon any transfer, exchange or conversion thereof subsequent to the record date and prior to such interest payment date, except, if and to the extent the Company shall default in the payment of the interest due on such interest payment date, such defaulted interest shall be paid to the person in whose name such Debenture (or any Debenture or Debentures in exchange or substitution for which such Debenture shall have been issued) is registered on a record date fixed for the payment of such defaulted interest as hereinafter provided. A subsequent record date may be established by or on behalf of the Company by notice to the registered holders not less than ten days preceding such record date, which shall not be less than 10 days or more than 30 days prior to the date of payment of such defaulted interest. The term "record date" as used in this Section with respect to any interest payment, other than a defaulted interest payment, shall mean the close of business on the last business day occurring prior to 15 days next preceding the applicable interest payment date.

SECTION 2.04. The Debentures shall be signed on behalf of the Company, manually or in facsimile, by its President or a Vice President and its Secretary or an Assistant Secretary under its corporate seal, which may be in facsimile. Only such Debentures as shall bear thereon a certificate of authentication substantially in the form hereinbefore recited, executed by the Trustee, shall be entitled to the benefits of this Indenture or be valid or obligatory for any purpose. Such certificate by the Trustee upon any Debenture executed by the Company shall be conclusive evidence that the Debenture so authenticated has been duly authenticated and delivered hereunder and that the holder is entitled to the benefits of this Indenture.

In case any officer of the Company who shall have signed any of the Debentures, manually or in fascimile, shall cease to be such officer

before the Debentures so signed shall have been authenticated and delivered by the Trustee, or disposed of by the Company, such Debentures nevertheless may be authenticated and delivered or disposed of as though the person who signed such Debentures had not ceased to be such officer of the Company; and any Debentures may be signed on behalf of the Company, manually or in facsimile, by any person who at the actual date of the execution of such Debenture shall be a proper officer of the Company, although at the date of the execution of this Indenture such person was not such officer.

SECTION 2.05. Debentures may be exchanged for a like aggregate principal amount of Debentures of other authorized denominations. The Debentures to be exchanged shall be surrendered at the office or agency to be maintained by the Company in accordance with the provisions of Section 6.02, and the Company shall execute and the Trustee shall authenticate and deliver in exchange therefor the Debenture or Debentures which the Debentureholder making the exchange shall be entitled to receive.

The Company shall keep, at the corporate trust office of the Trustee in the Borough of Manhattan, The City of New York, State of New York, a register or registers in which, subject to such reasonable regulations as it may prescribe, the Company shall register transfers and exchanges of Debentures as in this Article Two provided. Upon surrender for transfer of any Debenture at such office, the Company shall execute and the Trustee shall authenticate and deliver in the name of the transferee or transferees a new Debenture or Debentures for a like aggregate principal amount.

All Debentures presented or surrendered for exchange, transfer, redemption, conversion or payment shall, if so required by the Company or the Trustee, be accompanied by a written instrument or instruments of transfer, in form satisfactory to the Company and the Trustee, duly executed by the holder or by his duly authorized agent or legal representative.

No service charge shall be made for any exchange or transfer of Debentures, but the Company may require payment of a sum sufficient

to cover any tax or other governmental charge that may be imposed in relation thereto.

The Company shall not be required to make transfers or exchanges of Debentures for a period of 15 days next preceding the mailing of notice of partial redemption of Debentures. The Company shall not be required to make transfers or exchanges of any Debentures called or being called for redemption, except, in the case of any Debentures to be redeemed in part, the portion thereof not so to be redeemed.

SECTION 2.06. Pending the preparation of definitive Debentures, the Company may execute and the Trustee shall authenticate and deliver temporary Debentures (printed or lithographed) of any authorized denomination, and substantially in the form of the definitive Debentures, but with or without a recital of specific redemption prices and with such other omissions, insertions and variations as may be appropriate for temporary Debentures, all as may be determined by the Board of Directors. Temporary Debentures may contain such reference to any provisions of the Indenture as may be appropriate. Every such temporary Debenture shall be authenticated by the Trustee upon the same conditions and in substantially the same manner, and with the same effect, as the definitive Debentures. Without unnecessary delay the Company will execute and deliver to the Trustee definitive Debentures and thereupon any or all temporary Debentures may be surrendered in exchange therefor, at the office or agency to be maintained by the Company for such purpose pursuant to Section 6.02, and the Trustee shall authenticate and deliver in exchange for such temporary Debentures an equal aggregate principal amount of definitive Debentures. Until so exchanged, the temporary Debentures shall in all respects be entitled to the same benefits under this Indenture as definitive Debentures authenticated and delivered hereunder.

SECTION 2.07. In case any temporary or definitive Debenture shall become mutilated or be destroyed, lost or stolen, the Company, in the case of any mutilated Debenture shall, and in the case of any destroyed,

lost or stolen Debenture in its discretion may, execute, and upon its request the Trustee shall authenticate and deliver, a new Debenture in exchange and substitution for the mutilated Debenture, or in lieu of and substitution for the Debenture so destroyed, lost or stolen, or, if any such Debenture shall have matured or shall be about to mature, instead of issuing a substituted Debenture, the Company may pay the same without surrender thereof, except in the case of a mutilated Debenture. In every case the applicant for a substituted Debenture or for such payment shall furnish to the Company and to the Trustee such security or indemnity as may be required by them to save each of them harmless, and, in every case of destruction, loss or theft, the applicant shall also furnish to the Company and to the Trustee evidence to their satisfaction of the destruction, loss or theft of such Debenture. The Trustee may authenticate any such substituted Debenture and deliver the same, or the Trustee or any paying agent of the Company may make any such payment, upon the written request or authorization of any officer of the Company and shall incur no liability to anyone by reason of anything done or omitted to be done by it in good faith under the provisions of this Section. Upon the issuance of any substituted Debenture, the Company may require the payment of a sum sufficient to cover any tax or other governmental charge that may be imposed in relation thereto and any other expenses connected therewith and in addition a further sum not exceeding two dollars for each Debenture so issued in substitution.

Every substituted Debenture issued pursuant to the provisions of this Section in substitution for any destroyed, lost or stolen Debenture shall constitute an additional contractual obligation of the Company, whether or not the destroyed, lost or stolen Debenture shall be found at any time, and shall be entitled to all the benefits of this Indenture equally and proportionately with any and all other Debentures duly issued hereunder.

All Debentures shall be held and owned upon the express condition that the foregoing provisions are exclusive with respect to the replacement or payment of mutilated, destroyed, lost or stolen Debentures and shall preclude any and all other rights or remedies, notwith-

standing any law or statute existing or hereafter enacted to the contrary with respect to the replacement or payment of negotiable instruments or other securities without their surrender.

SECTION 2.08. All Debentures surrendered for the purpose of payment, redemption, conversion, exchange, substitution or transfer, or in discharge in whole or in part of any sinking fund payment, shall, if surrendered to the Company or any paying agent, be delivered to the Trustee for cancelation or, if surrendered to the Trustee, shall be cancelled by it, and no Debentures shall be issued in lieu thereof except as expressly permitted by any of the provisions of this Indenture. The Trustee shall, at the request of the Company, return cancelled Debentures to the Company. If the Company shall acquire any of the Debentures, however, such acquisition shall not operate as a redemption or satisfaction of the indebtedness represented by such Debentures unless and until the same are surrendered to the Trustee for cancelation.

SECTION 2.09. The Debentures shall not be deemed Senior Indebtedness within the meaning of and for the purposes of the Indenture dated as of May 15, 1965, between the Company and Chemical Bank New York Trust Company, as Trustee, under which the 5½% Subordinated Debentures due May 15, 1990, of the Company were issued.

ARTICLE THREE

SUBORDINATION OF DEBENTURES

SECTION 3.01. The Company, for itself, its successors and assigns, covenants and agrees, and each holder of Debentures, by his acceptance thereof, likewise covenants and agrees, that the payment of the principal of (and premium, if any, on), sinking fund for and interest on each and all of the Debentures is hereby expressly subordinated in right of payment, to the extent and in the manner hereinafter set forth, to the prior payment in full of all Senior Indebtedness.

SECTION 3.02. No payment on account of principal, premium, sinking fund or interest on the Debentures shall be made unless full payment of amounts then due for principal, premium, if any, sinking funds, and interest on all Senior Indebtedness has been made or duly provided for in money or money's worth. No payment on account of principal, premium, sinking fund or interest on the Debentures shall be made if, at the time of such payment or immediately after giving effect thereto, there shall exist under any Senior Indebtedness or any agreement pursuant to which any such Senior Indebtedness is issued any default or any condition, event or act, which, with notice or lapse of time, or both, would constitute a default, and such default, condition, event or act shall not have been cured or waived or shall not have ceased to exist.

SECTION 3.03. (a) Upon (i) any acceleration of the principal amount due on the Debentures because of an Event of Default or (ii) any distribution of assets of the Company upon any dissolution, winding up, liquidation or reorganization of the Company (whether in bankruptcy, insolvency or receivership proceedings or upon an assignment for the benefit of creditors or any other dissolution, winding up, liquidation or reorganization of the Company),

(1) the holders of all Senior Indebtedness shall first be entitled to receive payment in full of the principal thereof (and premium, if any) and the interest thereon before the holders of the Debentures shall be entitled to receive any payment on account of the principal of (and premium, if any) or interest on the Debentures;

(2) any payment or distribution of assets of the Company of any kind or character, whether in cash, property or securities (other than securities of the Company as reorganized or readjusted or securities of the Company or any other corporation provided for by a plan of reorganization or readjustment the payment of which is subordinate, at least to the extent provided in this Article Three with respect to the Debentures, to the payment of all indebtedness of the nature of Senior Indebtedness) to which the holders of the Debentures or the Trustee would be entitled except for the provisions of this Article Three shall be paid by the liquidating trustee

or agent or other person making such a payment or distribution, whether a trustee in bankruptcy, a receiver or liquidating trustee or other trustee or agent, directly to the holders of Senior Indebtedness or their representative or representatives or to the trustee or trustees under any indenture pursuant to which any instruments evidencing any of such Senior Indebtedness may have been issued, ratably according to the aggregate amounts remaining unpaid on account of the principal of (and premium, if any) and interest on the Senior Indebtedness held or represented by each, to the extent necessary to make payment in full of all Senior Indebtedness remaining unpaid, after giving effect to any concurrent payment or distribution to the holders of such Senior Indebtedness; and

(3) in the event that, notwithstanding the foregoing, any payment or distribution of assets of the Company of any kind or character, whether in cash, property or securities (other than securities of the Company as reorganized or readjusted or securities of the Company or any other corporation provided for by a plan of reorganization or readjustment the payment of which is subordinate, at least to the extent provided in this Article Three with respect to the Debentures, to the payment of all indebtedness of the nature of Senior Indebtedness), which, under the provisions of paragraph (2) of this subsection (a), should have been paid to the holders of Senior Indebtedness, shall be received by the Trustee or the holders of the Debentures before all Senior Indebtedness is paid in full, such payment or distribution shall be paid over to the holders of Senior Indebtedness remaining unpaid or their representative or representatives or to the trustee or trustees under any indenture pursuant to which any instrument evidencing any of such Senior Indebtedness may have been issued, ratably as aforesaid, for application to the payment of such Senior Indebtedness until all such Senior Indebtedness shall have been paid in full, after giving effect to any concurrent payment or distribution to the holders of such Senior Indebtedness.

Subject to the payment in full of all Senior Indebtedness, the holders of the Debentures shall be subrogated to the rights of the holders of

Senior Indebtedness to receive payments or distributions of cash, property or securities of the Company applicable to the Senior Indebtedness until the principal of and interest on the Debentures shall be paid in full, and for purposes of such subrogation, no such payments or distributions to the holders of Senior Indebtedness of cash, property or securities which otherwise would have been payable or distributable to holders of the Debentures shall, as between the Company, its creditors other than the holders of Senior Indebtedness, and the holders of the Debentures, be deemed to be a payment by the Company to the holders of or on account of the Senior Indebtedness, and no such payments or distributions to the holders of the Debentures of cash, property or securities otherwise distributable to the holders of Senior Indebtedness shall, as between the Company, its creditors other than the holders of Senior Indebtedness, and the holders of the Debentures, be deemed to be a payment by the Company to or on account of the Debentures. It is understood that the provisions of this Article Three are and are intended solely for the purpose of defining the relative rights of the holders of the Debentures, on the one hand, and the holders of the Senior Indebtedness, on the other hand. Nothing contained in this Article Three or elsewhere in this Indenture or in the Debentures is intended to or shall impair, as between the Company, its creditors other than the holders of Senior Indebtedness, and the holders of the Debentures, the obligation of the Company, which is unconditional and absolute, to pay to the holders of the Debentures the principal of (and premium, if any) and interest on the Debentures as and when the same shall become due and payable in accordance with their terms, or is intended to or shall affect the relative rights of the holders of the Debentures and creditors of the Company other than the holders of the Senior Indebtedness nor shall anything herein or therein prevent the Trustee or the holder of any Debenture from exercising all remedies otherwise permitted by applicable law upon default under this Indenture, subject to the rights, if any, under this Article Three of the holders of Senior Indebtedness in respect of cash, property or securities of the Company received upon the exercise of any such remedy. Upon any payment or distribution of assets of the Company referred to in this Article Three,

the Trustee, subject to the provisions of Section 9.01, and the holders of the Debentures shall be entitled to rely upon a certificate of the liquidating trustee or agent or other person making any distribution to the Trustee or to the holders of the Debentures for the purpose of ascertaining the persons entitled to participate in such distribution, the holders of the Senior Indebtedness and other indebtedness of the Company, the amount thereof or payable thereon, the amount or amounts paid or distributed thereon and all other facts pertinent thereto or to this Article Three. The Trustee, however, shall not be deemed to owe any fiduciary duty to the holders of Senior Indebtedness, and shall not be liable to any such holders if it shall mistakenly pay over or distribute to Debentureholders, the Company or any other person moneys or assets to which any holders of Senior Indebtedness shall be entitled by virtue of this Article Three or otherwise. Nothing contained in this Article Three or elsewhere in this Indenture, or in any of the Debentures, shall prevent the application by the Trustee of any moneys for the purpose of the payment of or on account of the principal of (and premium, if any, on), or interest on, the Debentures if such moneys were deposited with the Trustee hereunder (including deposits for the sinking fund) prior to its receipt of written notice of facts which would prohibit such application.

(b) The provisions of this Article Three shall not be applicable to any cash, properties or securities received by the Trustee or by any other holder of a Debenture when received as a holder of Senior Indebtedness and nothing in Section 9.13 or elsewhere in this Indenture shall deprive the Trustee of any of its rights as such holder.

(c) Notwithstanding the provisions of this Article Three or any other provisions of this Indenture, the Trustee shall not be charged with knowledge of the existence of any facts which would prohibit the making of any payment of moneys to the Trustee, or the application of such moneys by the Trustee in accordance with the terms hereof, unless and until the Trustee shall have received written notice thereof.

SECTION 3.04. Each holder of Debentures by his acceptance thereof authorizes and directs the Trustee in his behalf to take such

action as may be necessary or appropriate to effectuate, as between the holders of Senior Indebtedness and such Debentureholder, the subordination provided in this Article Three and appoints the Trustee his attorney-in-fact for such purpose.

ARTICLE FOUR

Redemption of Debentures—Sinking Fund

Section 4.01. The Company may at any time at its option redeem all, or from time to time any part of, the Debentures (but only in principal amounts of $1,000 or integral multiples thereof), otherwise than through operation of the sinking fund provided for in this Article Four, at the Regular Redemption Prices, together with interest accrued to the date fixed for redemption, and upon the terms applicable thereto specified in the form of Debenture hereinbefore set forth and in this Article Four.

Section 4.02. (a) On or before the business day next preceding April 15 in each year commencing with the year 1979 and ending with the year 1992 (each such business day being hereinafter referred to as a "Sinking Fund Payment Date"), the Company will make a mandatory payment (hereinafter called a "Mandatory Sinking Fund Payment" and together with any "Optional Sinking Fund Payment" called a "Sinking Fund Payment") to the Trustee of a sum in cash sufficient to retire by redemption, at the Sinking Fund Redemption Price, on the April 15 following such Sinking Fund Payment Date, $1,250,000 principal amount of Debentures, or the then outstanding principal amount of Debentures, whichever is less. As used in this Indenture, the term "Sinking Fund Redemption Price" shall mean 100% of the principal amount of any Debenture being redeemed pursuant to operation of the sinking fund.

(b) In addition to the Mandatory Sinking Fund Payments required by subsection (a) above, the Company, if it so elects, shall have the right to make, on or before any Sinking Fund Payment Date, an

optional payment (herein called an "Optional Sinking Fund Payment") to the Trustee of a sum in cash sufficient to retire by redemption, at the Sinking Fund Redemption Price, on the April 15 following such Sinking Fund Payment Date, a principal amount of Debentures up to a maximum amount equal to the Mandatory Sinking Fund Payment then being made, the right to make such Optional Sinking Fund Payment being non-cumulative. If the Company intends to exercise its right to make any such Optional Sinking Fund Payment on any Sinking Fund Payment Date, it shall include a statement to that effect, specifying the amount of the Optional Sinking Fund Payment which it intends so to make, in the Officers' Certificate required by Section 4.03 to be delivered on or before the March 1 next preceding such Sinking Fund Payment Date, whereupon the Sinking Fund Payment due on such Sinking Fund Payment Date shall be deemed for all purposes to be, or to be increased by, the amount so specified. If the Company shall fail to include such statement in such Officers' Certificate, it shall not be permitted to make an Optional Sinking Fund Payment on such Sinking Fund Payment Date.

(c) In satisfaction of all or any part of any Sinking Fund Payment, the Company may elect, by including a statement to that effect in the Officers' Certificate required by Section 4.03, to apply as a credit against such Sinking Fund Payment, at the Sinking Fund Redemption Price, in lieu of payment in cash, Debentures described in one or more of clauses (i), (ii) and (iii) below:

(i) Debentures theretofore issued and acquired (other than through the operation of the sinking fund and other than upon redemption or conversion thereof) by the Company and delivered to the Trustee cancelled or for cancelation and not theretofore applied as a credit against a Sinking Fund Payment;

(ii) Debentures redeemed and paid, pursuant to the provisions of this Article Four (otherwise than through the operation of the sinking fund), or which shall have been duly called for

redemption (otherwise than through the operation of the sinking fund) and the redemption price of which shall have been deposited in trust with the Trustee for that purpose and, in either case, which have not theretofore been applied as a credit against a Sinking Fund Payment; and

(iii) Debentures surrendered for conversion into Common Stock pursuant to the provisions of Article Five hereof and which neither have been called for redemption through the operation of the sinking fund nor theretofore been applied as a credit against a Sinking Fund Payment.

(d) The amount of any Sinking Fund Payment payable in cash on any Sinking Fund Payment Date shall automatically be reduced by the principal amount of the particular Debentures which shall have been called for redemption on the next ensuing April 15 for the sinking fund and shall have been surrendered prior to the close of business on the second business day next preceding such April 15 for conversion into Common Stock pursuant to the provisions of Article Five hereof.

SECTION 4.03. On or before the March 1 next preceding each Sinking Fund Payment Date, the Company will deliver to the Trustee an Officers' Certificate containing: (i) if the Company intends to exercise its right to make an Optional Sinking Fund Payment on such Sinking Fund Payment Date, the statement required by subsection (b) of Section 4.02 and (ii) in any event, a specification of the portions of the Sinking Fund Payment due or permitted on such Sinking Fund Payment Date which are to be satisfied by payment of cash and by credit for Debentures under subsection (c) of Section 4.02, respectively. On or before such March 1, the Company will also deliver to the Trustee any Debentures for which credit is elected to be taken under clause (iii) of subsection (c) of Section 4.02 and which shall not theretofore have been delivered to the Trustee.

On or before the 29th day next preceding each Sinking Fund Payment Date (but not before the earlier of the receipt of the Officers' Certificate referred to in the preceding paragraph or the March 1 next preceding each Sinking Fund Payment Date), the Trustee shall

select and call for redemption, in accordance with Section 4.06, such aggregate principal amount of Debentures for redemption on the next ensuing April 15 as would exhaust as nearly as may be the moneys (including moneys previously received and not theretofore applied) that would be available in the sinking fund if the cash Sinking Fund Payment to be made on such Sinking Fund Payment Date (as adjusted in accordance with the Officers' Certificate delivered pursuant to this Section 4.03 and assuming no reduction of the Sinking Fund Payment pursuant to subsection (d) of Section 4.02) is made; *provided, however,* that if at any time the aggregate principal amount of Debentures required to be redeemed in order to exhaust the aforesaid money, as hereinbefore provided, does not exceed Twenty-five Thousand Dollars ($25,000), the Trustee shall not call Debentures for redemption except upon written request of the Company but, upon the written request of the Company, the Trustee shall apply such moneys from time to time to the purchase of Debentures, by public or private purchase in the open market or otherwise, at not in excess of the principal amount thereof (excluding accrued interest and costs of purchase).

SECTION 4.04. The Trustee shall apply moneys received (including moneys previously received and not theretofore applied) pursuant to Section 4.02 to the redemption of outstanding Debentures called for redemption on the next succeeding April 15, in the manner and with the effect hereinafter provided, at the Sinking Fund Redemption Price. Accrued interest to the date fixed for redemption on Debentures to be redeemed for the sinking fund shall be paid by the Company and shall not be charged against sinking fund moneys. The Trustee shall not in any event be liable for the payment of principal of or interest on any Debentures called for redemption as herein provided, except to the extent that moneys shall have been furnished it for such purpose.

SECTION 4.05. Any Debentures delivered to or acquired by the Trustee pursuant to Sections 4.02 or 4.03, or redeemed pursuant to Section 4.01 or through the operation of the sinking fund, shall be cancelled by the Trustee and no Debentures shall be authenticated in lieu thereof, except as herein specifically provided.

SECTION 4.06. Notice of redemption to the holders of Debentures to be redeemed as a whole or in part, at the option of the Company or with sinking fund moneys, shall be given by the Company by mailing a copy of such notice not less than 30 nor more than 60 days prior to the date fixed for redemption to the holders of Debentures to be redeemed as a whole or in part, at their last addresses as they shall appear upon the register or registers provided for in Section 2.05, but failure to give such notice by mail to the holder of any Debenture, or any defect therein, shall not affect the validity or effectiveness of any call for redemption of any other Debenture. In the case of redemption through operation of the sinking fund such notice shall be given by the Trustee in the name and on behalf of the Company.

Each such notice of redemption shall specify the date fixed for redemption, the redemption price at which Debentures are to be redeemed, the place of payment, that payment will be made upon presentation and surrender of such Debentures, that interest accrued to the date fixed for redemption will be paid as specified in said notice, and that on and after said date interest thereon or on the portions thereof to be redeemed will cease to accrue. If all the outstanding Debentures are to be redeemed, the notice of redemption shall so state. If less than all the Debentures are to be redeemed, the notice of redemption shall identify the Debentures to be redeemed. In case any Debenture is to be redeemed in part only (which part must be $1,000 or an integral multiple thereof), the notice of redemption shall state the portion of the principal amount thereof to be redeemed and shall state that on and after the date fixed for redemption, upon surrender of such Debenture, a new Debenture or Debentures in principal amount equal to the unredeemed portion thereof will be issued. Each such notice of redemption shall also state the applicable conversion rate and that the right to convert the principal of the Debentures so to be redeemed will terminate at the close of business on the second business day next preceding the date fixed for redemption.

Prior to the redemption date specified in the notice of redemption given as provided in this Section 4.06, the Company, in case the redemption is being made at its option pursuant to Section 4.01, will

deposit with the Trustee or with one or more paying agents an amount of money sufficient to redeem on the redemption date all the Debentures so called for redemption and then outstanding at the appropriate redemption price, together with accrued interest to the date fixed for redemption. If less than all the Debentures are to be redeemed at the option of the Company it will give the Trustee and any paying agent written notice at least 45 days in advance of the redemption date as to the aggregate principal amount of Debentures to be redeemed.

If less than all the Debentures are to be redeemed, the Trustee shall select, in such manner as it shall deem appropriate and fair in its sole discretion, the Debentures to be redeemed, in whole or in part. The Trustee shall advise the Company in writing of the Debentures so selected.

SECTION 4.07. If notice of redemption has been mailed as above provided, the Debentures or portions of Debentures specified in such notice shall become due and payable on the date and at the place stated in such notice at the applicable redemption price, together with interest accrued to the date fixed for redemption, and on and after said date (unless the Company shall default in the payment of such Debentures at the redemption price, together with interest accrued to said date) interest on the Debentures or portions of Debentures so called for redemption shall cease to accrue. On presentation and surrender of such Debentures at said place of payment in said notice specified, the said Debentures or the specified portions thereof shall be paid and redeemed by the Company at the applicable redemption price, together with interest accrued thereon to the date fixed for redemption.

Upon presentation of any Debenture redeemed in part only, the Company shall execute, and the Trustee shall authenticate and deliver to or on the order of the holder thereof, at the expense of the Company, a new Debenture or Debentures, of authorized denominations in principal amount equal to the unredeemed portion of the Debenture so presented.

ARTICLE FIVE

Conversion of Debentures

Section 5.01. The holder of any Debenture or Debentures shall have the right at any time prior to maturity, at his option, to convert, subject to the terms and provisions of this Article Five, the principal amount of any such Debenture or Debentures (or any portion of the principal amount thereof which is an integral multiple of $1000) into fully paid and non-assessable shares of Common Stock at the conversion rate of 25.974 shares of Common Stock for each $1,000 principal amount of Debentures, subject in each case to any adjustments in such conversion rate pursuant to the provisions of Section 5.04 (except that with respect to any Debenture or Debentures which shall be called for redemption such right shall terminate at the close of business on the second business day next preceding the date fixed for redemption of such Debenture or Debentures, unless the Company shall default in payment due upon redemption thereof), upon surrender of the Debenture or Debentures, the principal of which is so to be converted, to the Company at any time during usual business hours at the office or agency to be maintained by it in accordance with the provisions of Section 6.02, and, if so required by the Company, accompanied by a written instrument or instruments of transfer in form satisfactory to the Company and the Trustee duly executed by the holder or his duly authorized agent or legal representative. Prior to delivery of any certificate or certificates representing shares of Common Stock into which the principal of such Debenture or Debentures is so to be converted, the Company shall have received a written notice at its said office or agency from the holder of the Debenture or Debentures so surrendered specifying the name or names (with address) in which said certificate or certificates are to be issued. For convenience, the conversion of all or a portion, as the case may be, of the principal of any Debenture into Common Stock is hereinafter sometimes referred to as the conversion of such Debenture. All Debentures surrendered for conversion shall, if surrendered to the Com-

pany or any conversion agent, be delivered to the Trustee for cancelation and cancelled by it or, if surrendered to the Trustee, shall be cancelled by it, and no Debentures shall be issued in lieu thereof. The Trustee within a reasonable time shall upon request return cancelled Debentures to the Company.

In case any Debenture shall be surrendered for conversion of only a portion of the principal amount thereof, the Company shall execute and the Trustee shall authenticate and deliver to the holder of such Debenture, at the expense of the Company, a new Debenture or Debentures in principal amount equal to the unconverted portion of the Debenture so surrendered.

In case of the surrender of any Debenture for conversion (in whole or in part) on a date after the record date (as defined in Section 2.03) for the payment of any interest on Debentures and before the date for payment of such interest, such Debenture shall be accompanied by funds in an amount equal to the amount of interest which would have been payable on such interest payment date in respect of the principal represented by the Debenture (or portion thereof) so surrendered for conversion had the same not been so surrendered for conversion; *provided, however,* that no such funds need be deposited in the case of any Debenture (or portion thereof) which has been duly called for redemption prior to such interest payment date. The funds so deposited shall be paid on the interest payment date to the person in whose name such Debenture (or the Debenture or Debentures in exchange or substitution for which such Debenture shall have been issued) was registered on such record date; *provided, however,* that if the Company shall default in the payment of interest due on the Debentures on such interest payment date, such funds shall be repaid to the person who deposited the same.

SECTION 5.02. As promptly as practicable after the surrender, as herein provided, of any Debenture or Debentures for conversion, the Company shall deliver or cause to be delivered at the office or agency to be maintained by it in accordance with the provisions of Section 6.02 to or upon the written order of the holder of the Debenture or

Debentures so surrendered a certificate or certificates representing the number of fully paid and non-assessable shares of Common Stock into which such Debenture or Debentures (or portion thereof) shall have been converted in accordance with the provisions of this Article Five. Prior to delivery of such certificate or certificates, the Company shall have received at its said office or agency from the holder of the Debenture or Debentures so surrendered the written notice referred to in Section 5.01 with respect to the name or names (with address) in which said certificate or certificates are to be issued. Subject to the following provisions of this Section and of Section 5.04, such conversion shall be deemed to have been made immediately prior to the close of business on the date that such Debenture or Debentures shall have been surrendered for conversion, so that the rights of the holder of such Debenture or Debentures (or the portion thereof being converted) as a Debentureholder shall cease at such time, and the person or persons entitled to receive the shares of Common Stock upon conversion of such Debenture or Debentures shall be treated for all purposes as having become the record holder or holders of such shares of Common Stock at such time, and such conversion shall be at the conversion rate in effect at such time; *provided, however,* that no such surrender on any date when the stock transfer books of the Company shall be closed shall be effective to constitute the person or persons entitled to receive the shares of Common Stock upon such conversion as the record holder or holders of such shares of Common Stock on such date, but such surrender shall be effective to constitute the person or persons entitled to receive such shares of Common Stock as the record holder or holders thereof for all purposes at the time immediately prior to the close of business on the next succeeding day on which such stock transfer books are open, and such conversion shall be at the conversion rate in effect at such time on such next succeeding day.

SECTION 5.03. No adjustments in respect of accrued interest or dividends shall be made upon the conversion of any Debenture or Debentures.

SECTION 5.04. The conversion rate from time to time in effect shall be subject to adjustment as follows:

(a) In case the Company shall (i) pay a dividend in shares of its capital stock, (ii) subdivide its outstanding shares of Common Stock, (iii) combine its outstanding shares of Common Stock into a smaller number of shares, or (iv) issue by reclassification of its shares of Common Stock any shares of the Company, the conversion rate in effect immediately prior thereto shall be adjusted retroactively as provided below so that the holder of any Debenture thereafter surrendered for conversion shall be entitled to receive the number of shares of the Company which he would have owned or have been entitled to receive after the happening of any of the events described above had such Debenture been converted immediately prior to the happening of such event. An adjustment made pursuant to this subsection (a) shall become effective retroactively immediately after the record date in the case of a dividend and shall become effective immediately after the effective date in the case of a subdivision, combination or reclassification.

(b) In case the Company shall issue rights or warrants to all holders of its Common Stock entitling them (for a period expiring within 45 days after the record date mentioned below) to subscribe for or purchase shares of Common Stock at a price per share less than the current market price per share of Common Stock (as defined in subsection (d) below) at the record date mentioned below, the number of shares of Common Stock into which each $1,000 principal amount of Debentures shall thereafter be convertible shall be determined by multiplying the number of shares of Common Stock into which such principal amount of Debentures was theretofore convertible by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding on the date of issuance of such rights or warrants plus the number of additional shares of Common Stock offered for subscription or purchase, and the denominator of which shall

be the number of shares of Common Stock outstanding on the date of issuance of such rights or warrants plus the number of shares which the aggregate offering price of the total number of shares so offered would purchase at such current market price. Subject to subsection (e), such adjustment shall be made whenever such rights or warrants are issued and shall become effective retroactively immediately after the record date for the determination of stockholders entitled to receive such rights or warrants.

(c) In case the Company shall distribute to all holders of its Common Stock evidences of its indebtedness or assets (excluding cash dividends or distributions) or rights to subscribe or warrants to purchase (excluding those referred to in subsection (b) above), then in each such case the number of shares of Common Stock into which each $1,000 principal amount of Debentures shall thereafter be convertible shall be determined by multiplying the number of shares of Common Stock into which such principal amount of Debentures was theretofore convertible by a fraction, the numerator of which shall be the current market price (as defined in subsection (d) below) per share of Common Stock on the date of such distribution, and the denominator of which shall be such current market price per share of the Common Stock, less the then fair market value (as determined by the Board of Directors, whose determination shall be conclusive, and described in a statement filed with the Trustee) of the portion of the assets or evidences of indebtedness so distributed or of such subscription rights or warrants applicable to one share of the Common Stock. Subject to subsection (e), such adjustment shall be made whenever any such distribution is made and shall become effective retroactively immediately after the record date for the determination of stockholders entitled to receive such distribution.

(d) For the purpose of any computation under subsections (b) and (c) above, the current market price per share of Common Stock at any date shall be deemed to be the average of the daily closing prices for the 30 consecutive business days com-

mencing 45 business days before the day in question. The closing price for each day shall be the last reported sales price regular way or, in case no such reported sale takes place on such day, the average of the reported closing bid and asked prices regular way, in either case on the New York Stock Exchange, or, if the Common Stock is not listed or admitted to trading on such Exchange, on the principal national securities exchange on which the Common Stock is listed or admitted to trading, or if not listed or admitted to trading on any national securities exchange, the average of the closing bid and asked prices as furnished by any New York Stock Exchange firm selected from time to time by the Company for the purpose.

(e) No adjustment in the conversion rate shall be required unless such adjustment would require an increase or decrease of at least 1% in such rate; *provided, however,* that any adjustments which by reason of this subsection (e) are not required to be made shall be carried forward cumulatively and taken into account in any subsequent adjustment which (including such carry-forward) requires an increase or decrease of at least 1%. All calculations under this Article Five shall be made to the nearest cent or to the nearest one-thousandth of a share, as the case may be.

(f) Whenever the conversion rate is adjusted, as herein provided, the Company shall promptly file with the Trustee a certificate of a firm of independent public accountants selected by the Board of Directors (who may be the regular accountants employed by the Company) setting forth the conversion rate applicable after such adjustment and setting forth a brief statement of the facts requiring such adjustment. Such certificate shall be conclusive evidence of the correctness of such adjustment. Promptly after receipt of such certificate, the Trustee, in the name of the Company and as its agent, shall mail a notice specifying such adjustment to each Debentureholder at his last address appearing on the registration books of the Company. The Trustee shall not at any time be under any duty or responsibility to any Debentureholder

to determine whether any facts exist which may require any adjustment of the conversion rate.

(g) In the event that at any time, as a result of an adjustment made pursuant to subsection (a) of this Section, the holder of any Debenture thereafter surrendered for conversion shall become entitled to receive any shares of the Company other than shares of its Common Stock, thereafter the number of such other shares so receivable upon conversion of any Debenture shall be subject to adjustment from time to time in a manner and on terms as nearly equivalent as practicable to the provisions with respect to the Common Stock contained in subsections (a) to (f), inclusive, of this Section, and the provisions of Sections 5.02 and 5.05 to 5.09, inclusive, with respect to the Common Stock shall apply on like terms to any such other shares.

SECTION 5.05. No fractional shares or scrip representing fractional shares shall be issued upon the conversion of any Debenture or Debentures. If more than one Debenture shall be surrendered for conversion at one time by the same holder, the number of full shares issuable upon conversion thereof shall be computed on the basis of the aggregate principal amount of the Debentures so surrendered. If the conversion of any Debenture or Debentures results in a fraction, an amount equal to such fraction multiplied by the closing price (determined as provided in Section 5.04(d)) of the Common Stock on the day of conversion shall be paid to such holder in cash by the Company.

SECTION 5.06. In case of any consolidation of the Company with or merger of the Company into another corporation, or in case of any sale or other disposition of all or substantially all the property of the Company as an entirety to any person, the corporation resulting from such consolidation or such successor or acquiring person, as the case may be, shall execute and deliver to the Trustee a supplemental indenture, in form satisfactory to the Trustee, providing that the holder of each Debenture then outstanding shall have the right thereafter to convert such Debenture into the kind and amount of shares of

stock and other securities and property receivable upon such consolidation, merger, sale, lease or other disposition by a holder of the number of shares of Common Stock of the Company into which such Debenture might have been converted immediately prior to such consolidation, merger, sale or other disposition. Such supplemental indenture shall provide for adjustments which shall be as nearly equivalent as may be practicable to the adjustments provided for in this Article Five. The provisions of this Section shall similarly apply to successive consolidations, mergers, sales or other dispositions. Notice of the execution of such a supplemental indenture shall be given in accordance with the provisions of Section 12.02.

The Trustee shall not be under any responsibility to determine the correctness of any provisions contained in any such supplemental indenture relating either to the kind or amount of shares of stock or securities or property receivable by Debentureholders upon the conversion of their Debentures after any such consolidation, merger, sale, lease or other disposition or to any such adjustment, but, subject to the provisions of Section 9.01, may accept as conclusive evidence of the correctness of any such provisions, and shall be protected in relying upon, an Opinion of Counsel with respect thereto.

SECTION 5.07. The Company covenants that it will at all times reserve and keep available out of its authorized Common Stock, solely for the purpose of issuance upon conversion of Debentures as herein provided, such number of shares of Common Stock as shall then be issuable upon the conversion of all outstanding Debentures. The Company covenants that all shares of Common Stock which shall be so issuable shall, when issued, be duly and validly issued and fully paid and non-assessable.

The Company covenants that, upon conversion of Debentures as herein provided, there will be credited to Common Stock capital account, from the consideration for which the shares of Common Stock issuable upon such conversion are issued, an amount per share of Common Stock so issued as determined by the Board of Directors, which amount shall not be less than the amount required by law

and by the Certificate of Incorporation of the Company, as amended, as in effect on the date of such conversion. For the purposes of this covenant the principal amount of the Debentures converted, less the amount of cash paid in lieu of the issuance of fractional shares on such conversion, shall be deemed to be the amount of consideration for which the shares of Common Stock issuable upon such conversion are issued.

SECTION 5.08. The Company covenants that if any shares of Common Stock required to be reserved for purposes of conversion of Debentures hereunder require registration with or approval of any governmental authority under any Federal or State law before such shares may be issued upon conversion, the Company will in good faith and as expeditiously as possible endeavor to cause such shares to be duly registered or approved, as the case may be. The Company further covenants that, at any time when the Common Stock of the Company is listed on the New York Stock Exchange or any other national securities exchange, the Company will, if permitted by the rules of such exchange, list and keep listed on such exchange, upon official notice of issuance, all shares of Common Stock issuable upon conversion of Debentures.

SECTION 5.09. The issuance of certificates for shares of Common Stock upon the conversion of Debentures shall be made without charge to the converting Debentureholders for any tax in respect of the issuance of such certificates, and such certificates shall be issued in the respective names of, or in such names as may be directed by, the holders of the Debentures converted; *provided, however,* that the Company shall not be required to pay any tax which may be payable in respect of any transfer involved in the issuance and delivery of any such certificate in a name other than that of the holder of the Debenture converted, and the Company shall not be required to issue or deliver such certificates unless or until the person or persons requesting the issuance thereof shall have paid to the Company the amount of such tax or shall have established to the satisfaction of the Company that such tax has been paid.

SECTION 5.10. In case the Company proposes to take any action (other than actions of the character described in clauses (i), (ii) or

(iii) of subsection (a) of Section 5.04) which would require an adjustment of the conversion rate pursuant to Section 5.04 or proposes to take any action of the type specified in Section 5.06, the Company shall give notice to the holders of Debentures at their last addresses as they shall appear upon the register or registers provided for in Section 2.05 at least ten days prior to the applicable record date in the case of action which would require an adjustment of the conversion rate pursuant to Section 5.04 and at least ten days prior to the taking of any action described in Section 5.06, which notice shall state (i) in the case of action requiring an adjustment of the conversion rate pursuant to Section 5.04, the record date as of which such action is to be taken and (ii) in the case of action specified in Section 5.06, the date on which such action is to become effective, and in each case such notice shall describe the action to be taken and, to the extent such effect may be known at the date of such notice, the effect of such action on the conversion ratio and the number, or kind, or class of shares or other securities or property obtainable upon conversion of the Debentures. Failure to give such notice or any defect therein shall not affect the legality or validity of any such action.

SECTION 5.11. The Trustee shall not be accountable with respect to the validity or value (or the kind or amount) of any shares of Common Stock or of any securities or property which may at any time be issued or delivered upon the conversion of any Debentures; and it makes no representation with respect thereto. The Trustee shall not be responsible for any failure of the Company to make any cash payment or to issue, transfer or deliver any shares of Common Stock or stock certificates or other securities or property upon the surrender of any Debenture for the purpose of conversion, or to comply with any of the covenants of the Company contained in this Article Five, all subject to Section 9.01.

ARTICLE SIX

PARTICULAR COVENANTS OF THE COMPANY

The Company covenants as follows:

SECTION 6.01. The Company will duly and punctually pay or cause to be paid the principal (and premium, if any) and interest on

each of the Debentures at the time and place and in the manner provided in the Debentures.

SECTION 6.02. As long as any of the Debentures remain outstanding, the Company will maintain in the Borough of Manhattan, The City of New York, State of New York, (i) an agency where the Debentures may be presented for payment, (ii) an agency where the Debentures may be presented for transfer and exchange as herein provided, (iii) an agency where notices and demands to or upon the Company in respect of the Debentures or of this Indenture may be served and (iv) an agency where the Debentures may be presented for conversion as in this Indenture provided. Until otherwise designated by the Company in a written notice to the Trustee, such agencies shall be the office of the Trustee in the Borough of Manhattan, The City of New York, State of New York, where its corporate trust department is located and the Company hereby designates the Trustee as its agent for the above-described purposes. The Company may at any time and from time to time, by written notice to the Trustee, change any agency required by this Section and the location thereof.

SECTION 6.03. The Company, whenever necessary to avoid or fill a vacancy in the office of Trustee, will appoint, in the manner provided in Section 9.10, a Trustee, so that there shall at all times be a Trustee hereunder.

SECTION 6.04. (a) If the Company shall appoint a paying agent other than the Trustee, it will cause such paying agent to execute and deliver to the Trustee an instrument in which such agent shall agree with the Trustee, subject to the provisions of this Section,

(1) that it will hold all sums held by it as such agent for the payment of the principal of (and premium, if any) or interest on the Debentures (whether such sums have been paid to it by the Company or by any other obligor on the Debentures) in trust for the benefit of the holders of the Debentures, or of the Trustee, as the case may be,

(2) that it will give the Trustee notice of any failure by the Company (or by any other obligor on the Debentures) to make any payment of the principal of (and premium, if any) or interest on the Debentures when the same shall be due and payable, and

(3) that it shall, at any time during the continuance of any Event of Default specified in subsections (a) or (b) of Section 8.01, upon the written request of the Trustee, deliver to the Trustee all sums so held in trust by it.

(b) If the Company shall act as its own paying agent, it will, on or before each due date of the principal of (and premium, if any) or interest on the Debentures, set aside, segregate and hold in trust for the benefit of the holders of the Debentures a sum sufficient to pay such principal (and premium, if any) or interest so becoming due and will notify the Trustee of any failure (by it or any other obligor on the Debentures) to take such action.

(c) Anything in this Section to the contrary notwithstanding, the Company may, at any time, for the purpose of obtaining a satisfaction and discharge of this Indenture, or for any other reason, pay or cause to be paid to the Trustee all sums held in trust by it, or any paying agent hereunder, as required by this Section, such sums to be held by the Trustee upon the trusts herein contained.

(d) Anything in this Section to the contrary notwithstanding, the agreement to hold sums in trust as provided in this Section is subject to the provisions of Sections 14.03 and 14.04.

SECTION 6.05. In order to prevent any accumulation of claims for interest after maturity, the Company will not, directly or indirectly, extend or assent to the extension of the time for the payment of any claim for interest on any of the Debentures, and will not, directly or indirectly, be a party to or approve of any such arrangement by purchasing or funding such claims for interest or in any other manner; *provided, however,* that this Section shall not apply in any case where an extension shall be pursuant to a plan proposed by the Company to and approved by the holders of all the Debentures then outstanding.

SECTION 6.06. The Company covenants and warrants that it is duly authorized under the laws of the State of Delaware and under all other provisions of law applicable thereto to create and issue the Debentures and to execute this Indenture, that all corporate action on its part for the creation and issue of the Debentures and the execution of this Indenture has been duly and effectively taken and that the Debentures,

when issued, will be valid and binding obligations of the Company and entitled to the benefits of this Indenture.

SECTION 6.07. So long as any of the Debentures shall be outstanding, the Company will, and will cause each Subsidiary to, at all times (i) keep proper books of record and account in which full, true and correct entries will be made of its transactions in accordance with generally accepted accounting principles and (ii) set aside on its books from its earnings reserves for depreciation, depletion, obsolescence and amortization, or any of them, of its properties during each year and all other proper reserves which, in accordance with generally accepted accounting principles, should be set aside from such earnings in connection with its business.

SECTION 6.08. So long as any of the Debentures shall be outstanding, the Company will, and will cause each Subsidiary to,

(a) pay and discharge promptly or cause to be paid and discharged promptly all taxes, assessments and governmental charges or levies imposed upon it or upon its income or profits or upon any of its property, real, personal or mixed, or upon any part thereof, as well as all claims for labor, materials and supplies which, if unpaid, might by law become a lien or charge upon its property; *provided, however,* that neither the Company nor any Subsidiary shall be required (1) to pay any such tax, assessment, charge or levy so long as the same shall not be subject to penalty for nonpayment or (2) to pay any such tax, assessment, charge, levy or claim if the amount, applicability or validity thereof shall currently be contested in good faith by appropriate proceedings and the Company or such Subsidiary, as the case may be, shall have set aside on its books reserves (segregated to the extent required by generally accepted accounting principles) deemed by it adequate with respect thereto;

(b) except as otherwise specifically permitted in this Indenture, do or cause to be done all things necessary to preserve and keep in full force and effect its corporate existence, rights and franchises; *provided, however,* that nothing in this subsection shall prevent the abandonment or termination of the existence, rights and franchises of any Subsidiary if, in the opinion of the Board,

such abandonment or termination is in the interest of the Company and not disadvantageous in any material respect to the holders of the Debentures; and

(c) maintain and keep, or cause to be maintained and kept, except only as interrupted by causes beyond its control, its properties (including improvements to leased properties) in good repair, working order and condition, and from time to time make or cause to be made all needful and proper repairs, renewals and replacements, so that the business carried on in connection therewith may be properly and advantageously conducted at all times.

Nothing contained in this Section shall prevent or restrict the sale, abandonment or other disposition by the Company or any Subsidiary of any of their respective properties, or discontinuing a part of their respective business if, in the judgment of the Board of Directors, such sale, abandonment, disposition or discontinuance is deemed advisable in the interest of the business of the Company.

SECTION 6.09. So long as any of the Debentures shall be outstanding, the Company will insure and keep insured, and will cause every Subsidiary to insure and keep insured, to a reasonable amount with reputable insurance companies, so much of their respective properties as companies engaged in a similar business and to the extent such companies in accordance with good business practice customarily insure properties of a similar character, against loss by fire and from other causes or, in lieu thereof, in the case of itself or of any one or more of its Subsidiaries, the Company will maintain or cause to be maintained a system or systems of self-insurance and, in such cases of self-insurance, will cause to be maintained an insurance reserve or insurance reserves adequate for itself and its Subsidiaries, all as determined in the judgment of the Board of Directors to be necessary in the interest of the business of the Company as a whole.

The Company shall be under no obligation to file with the Trustee evidence that it has complied or is complying with this Section (except as provided in Section 6.11).

SECTION 6.10. The Company will not, except as provided below in this Section 6.10, (a) declare or pay any dividend or make any dis-

tribution on its stock or to its stockholders (other than dividends or distributions payable in shares of Common Stock of the Company), (b) purchase, redeem or otherwise acquire or retire for value any shares of its stock or (c) permit a Subsidiary to purchase, redeem or otherwise acquire or retire for value any shares of stock of the Company, if upon giving effect to such dividend, distribution, purchase, redemption, other acquisition or retirement, the aggregate amount expended for all such purposes subsequent to December 2, 1967, shall exceed the sum of (i) the aggregate consolidated net income (including extraordinary items) of the Company (determined in accordance with generally accepted accounting principles) earned subsequent to December 2, 1967; (ii) the net proceeds of the issue or sale after December 2, 1967, of stock of the Company; (iii) the net proceeds of the issue or sale after December 2, 1967, of any indebtedness of the Company (including the Debentures) which thereafter has been converted into shares of stock of the Company; and (iv) $10,000,000. Nothing contained in the foregoing provisions of this Section 6.10 shall prevent (a) the payment of any dividend within ninety days after the date of declaration thereof, if at said date said declaration complied with the provisions hereof; (b) the retirement of any shares of any class of the Company's stock by exchange for, or out of the proceeds of the substantially concurrent sale of, other shares of its stock, or the retirement of any shares of any class of the Company's stock (other than its Common Stock) by exchange for, or out of the proceeds of the substantially concurrent sale of, indebtedness which is subordinated to the Debentures to the same extent that the Debentures are subordinated to Senior Indebtedness pursuant to Article Three hereof, and no effect shall be given to any such retirement or the proceeds of any such sale or exchange in any computation made under this Section 6.10; or (c) the payment of dividends on, or the purchase, redemption, other acquisition or retirement of, any class of Preferred Stock of the Company, provided that any amounts expended by the Company for any such purpose shall be included in any computation made under this Section 6.10. In the case of stock or indebtedness of the Company issued or sold for property other than cash, proceeds received by the Company for the purpose hereof shall be deemed the fair value of the property received as determined by the Board of Directors.

SECTION 6.11. The Company will, within 120 days following the end of each fiscal year, commencing with the fiscal year ending November 30, 1968, file with the Trustee an Officers' Certificate stating that in the course of the performance by the signers of their duties as officers of the Company they would normally obtain knowledge of any default by the Company in the performance of any covenant or agreement contained in this Article Six, stating whether or not they have obtained knowledge of such default and, if so, specifying each such default of which the signers have knowledge and the nature thereof. Such certificate need not include reference to any default which has been duly cured prior to the date as of which such certificate speaks.

ARTICLE SEVEN

DEBENTUREHOLDERS' LISTS AND REPORTS BY THE COMPANY AND THE TRUSTEE

SECTION 7.01. The Company covenants and agrees that it will furnish or cause to be furnished to the Trustee between June 1 and June 15 and between December 1 and December 15 in each year beginning with 1968 (but not including June 1-June 15, 1968), and at such other times as the Trustee may request in writing, within 30 days after receipt by the Company of any such request, a list in such form as the Trustee may reasonably require containing all information in the possession or control of the Company, or any of its paying agents, other than the Trustee, as to the names and addresses of the holders of the Debentures obtained since the date as of which the next previous list, if any, was furnished. Any such list may be dated as of a date not more than 15 days prior to the time such information is furnished or caused to be furnished, and need not include information received after such date, but so long as the Trustee shall be the Debenture registrar such list shall not be required to be furnished.

SECTION 7.02. (a) The Trustee shall preserve, in as current a form as is reasonably practicable, all information as to the names and addresses of the holders of Debentures (1) contained in the most recent list furnished to it as provided in Section 7.01, and (2) received by it in the capacity of paying agent or registrar (if so acting) hereunder.

The Trustee may (1) destroy any list furnished to it as provided in Section 7.01 upon receipt of a new list so furnished, and (2) destroy any information received by it as paying agent or registrar (if so acting) hereunder upon delivering to itself as Trustee, not earlier than 45 days after an interest payment date of the Debentures, a list containing the names and addresses of the holders of Debentures obtained from such information since the delivery of the next previous list, if any.

(b) In case three or more holders of Debentures (hereinafter referred to as "applicants") apply in writing to the Trustee and furnish to the Trustee reasonable proof that each applicant has owned a Debenture for a period of at least six months preceding the date of such application, and such application states that the applicants desire to communicate with other holders of Debentures with respect to their rights under this Indenture or under the Debentures, and is accompanied by a copy of the form of proxy or other communication which such applicants propose to transmit, then the Trustee shall, within five business days after the receipt of such application, at its election, either

(1) afford to such applicants access to the information preserved at the time by the Trustee in accordance with the provisions of subsection (a) of this Section, or

(2) inform such applicants as to the approximate number of holders of Debentures whose names and addresses appear in the information preserved at the time by the Trustee, in accordance with the provisions of subsection (a) of this Section, and as to the approximate cost of mailing to such Debentureholders the form of proxy or other communication, if any, specified in such application.

If the Trustee shall elect not to afford such applicants access to such information, the Trustee shall, upon the written request of such applicants, mail to each Debentureholder whose name and address appears in the information preserved at the time by the Trustee in accordance with the provisions of subsection (a) of this Section, a copy of the form of proxy or other communication which is specified in such request, with reasonable promptness after a tender to the Trustee of the material to be mailed and of payment, or provision for the payment, of the reasonable expenses of mailing, unless within five days

after such tender the Trustee shall mail to such applicants and file with the Securities and Exchange Commission, together with a copy of the material to be mailed, a written statement to the effect that, in the opinion of the Trustee, such mailing would be contrary to the best interests of the holders of Debentures or would be in violation of applicable law. Such written statement shall specify the basis of such opinion. If said Commission, after opportunity for a hearing upon the objections specified in the written statement so filed, shall enter an order refusing to sustain any of such objections or if, after the entry of an order sustaining one or more of such objections, said Commission shall find, after notice and opportunity for hearing, that all the objections so sustained have been met, and shall enter an order so declaring, the Trustee shall mail copies of such material to all such Debentureholders with reasonable promptness after the entry of such order and the renewal of such tender; otherwise the Trustee shall be relieved of any obligation or duty to such applicants respecting their application.

(c) Each and every holder of the Debentures, by receiving and holding the same, agrees with the Company and the Trustee that neither the Company nor the Trustee nor any paying agent shall be held accountable by reason of the disclosure of any such information as to the names and addresses of the holders of Debentures in accordance with the provisions of subsection (b) of this Section, regardless of the source from which such information was derived, and that the Trustee shall not be held accountable by reason of mailing any material pursuant to a request made under said subsection (b).

SECTION 7.03. (a) The Company covenants and agrees to file with the Trustee, within 15 days after the Company is required to file the same with the Securities and Exchange Commission, copies of the annual reports and of the information, documents and other reports (or copies of such portions of any of the foregoing as said Commission may from time to time by rules and regulations prescribe) which the Company may be required to file with said Commission pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934; or, if the Company is not required to file information, documents or reports pursuant to either of such Sections, then to file with the Trustee and said Commission, in accordance with rules and regulations pre-

scribed from time to time by said Commission, such of the supplementary and periodic information, documents and reports which may be required pursuant to Section 13 of the Securities Exchange Act of 1934 in respect of a security listed and registered on a national securities exchange as may be prescribed from time to time in such rules and regulations.

(b) The Company covenants and agrees to file with the Trustee and the Securities and Exchange Commission, in accordance with the rules and regulations prescribed from time to time by said Commission, such additional information, documents and reports with respect to compliance by the Company with the conditions and covenants provided for in this Indenture as may be required from time to time by such rules and regulations.

(c) The Company covenants and agrees to transmit to the holders of Debentures within 30 days after the filing thereof with the Trustee, in the manner and to the extent provided in subsection (c) of Section 7.04 with respect to reports pursuant to subsection (a) of said Section 7.04, such summaries of any information, documents and reports required to be filed by the Company pursuant to subsections (a) and (b) of this Section 7.03 as may be required by rules and regulations prescribed from time to time by the Securities and Exchange Commission.

SECTION 7.04. (a) Within 60 days after June 15 of each year beginning with the year 1968 the Trustee, so long as any Debentures are outstanding hereunder, shall transmit to the Debentureholders, as hereinafter in this Section provided, a brief report as of such June 15, with respect to:

(1) its eligibility under Section 9.09, and its qualifications under Section 9.08, or in lieu thereof, if to the best of its knowledge it has continued to be eligible and qualified under such Sections, a written statement to such effect;

(2) the character and amount of any advances (and, if the Trustee elects so to state, the circumstances surrounding the making thereof) made by the Trustee (as such) which remain unpaid on the date of such report, and for the reimbursement of which it claims or may claim a lien or charge, prior to that of the

Debentures, on any property or funds held or collected by it as Trustee, except that the Trustee shall not be required (but may elect) to report such advances if such advances so remaining unpaid aggregate ½% or less of the principal amount of the Debentures outstanding on the date of such report;

(3) the amount, interest rate, and maturity date of all other indebtedness owing by the Company (or by any other obligor on the Debentures) to the Trustee in its individual capacity, on the date of such report, with a brief description of any property held as collateral security therefor, except an indebtedness based upon a creditor relationship arising in any manner described in paragraph (2), (3), (4) or (6) of subsection (b) of Section 9.13;

(4) the property and funds, if any, physically in the possession of the Trustee (as such) on the date of such report;

(5) any additional issue of Debentures which the Trustee has not previously reported; and

(6) any action taken by the Trustee in the performance of its duties under this Indenture which it has not previously reported and which in its opinion materially affects the Debentures, except action in respect of a default, notice of which has been or is to be withheld by it in accordance with the provisions of Section 8.07.

(b) The Trustee shall transmit to the Debentureholders, as hereinafter provided, a brief report with respect to the character and amount of any advances (and, if the Trustee elects so to state, the circumstances surrounding the making thereof) made by the Trustee as such since the date of the last report transmitted pursuant to the provisions of subsection (a) of this Section (or, if no such report has yet been so transmitted, since the date of execution of this Indenture), for the reimbursement of which it claims or may claim a lien or charge prior to that of the Debentures on property or funds held or collected by it as Trustee, and which it has not previously reported pursuant to this subsection, except that the Trustee shall not be required (but may elect) to report such advances if such advances remaining unpaid at any time aggregate 10% or less of the principal amount of Debentures outstanding at such time, such report to be transmitted within 90 days after such time.

(c) Each report pursuant to this Section shall be transmitted by mail

(1) to all registered holders of Debentures, as the names and addresses of such holders appear upon the registration books of the Company;

(2) to such holders of Debentures as have, within the two years preceding the transmission of such report, filed their names and addresses with the Trustee for that purpose; and

(3) except in the case of reports pursuant to the provisions of subsection (b) of this Section, to all holders of Debentures whose names and addresses have been furnished to, or received by, and preserved at the time by, the Trustee pursuant to the provisions of Section 7.02.

(d) A copy of each such report shall, at the time of such transmission to Debentureholders, be filed by the Trustee with each stock exchange upon which the Debentures are listed and also with the Securities and Exchange Commission. The Company agrees to notify the Trustee when and as the Debentures become listed on any stock exchange.

ARTICLE EIGHT

Remedies of the Trustee and Debentureholders upon Event of Default

Section 8.01. In case one or more of the following Events of Default shall have occurred and be continuing, that is to say:

(a) default in the due and punctual payment of any instalment of interest upon any of the Debentures as and when the same shall become due and payable, whether or not such payment shall be prevented by the provisions of Article Three, and continuance of such default for a period of 30 days; or

(b) default in the due and punctual payment of the principal of (and premium, if any, on) any of the Debentures as and when the same shall become due and payable either at maturity, upon redemption, by declaration as authorized by this Indenture, or otherwise, whether or not such payment shall be prevented by the provisions of Article Three; or

(c) default in making any Sinking Fund Payment as and when the same shall become due and payable and continuance of such default for a period of 30 days, whether or not such payment shall be prevented by the provisions of Article Three; or

(d) failure on the part of the Company to duly observe or perform any other of the covenants or agreements on the part of the Company in the Debentures or in this Indenture contained and written notice of such failure, requiring the same to be remedied, shall have been given to the Company by the Trustee, or to the Company and the Trustee by the holders of at least 25% in principal amount of the Debentures at the time outstanding and such failure shall have continued in force unremedied for a period of 60 days after the date of the Company's receipt of such notice; or

(e) a decree or order by a court having jurisdiction in the premises shall have been entered adjudging the Company a bankrupt or insolvent, or approving a petition seeking reorganization of the Company under the Federal Bankruptcy Act or any other similar applicable Federal or State law, and such decree or order shall have continued undischarged or unstayed for a period of 60 days; or a decree or order of a court having jurisdiction in the premises for the appointment of a receiver or liquidator or trustee or assignee in bankruptcy or insolvency of the Company of all or substantially all its property, or for the winding up or liquidation of its affairs, shall have been entered, and such decree or order shall have remained in force undischarged or unstayed for a period of 60 days; or

(f) the Company shall institute proceedings to be adjudicated a voluntary bankrupt, or shall consent to the filing of a bankruptcy proceeding against it, or shall file a petition or answer or consent seeking reorganization under the Federal Bankruptcy Act or any other similar applicable Federal or State law, or shall consent to the filing of any such petition, or shall consent to the appointment of a receiver or liquidator or trustee or assignee in bankruptcy or insolvency of it or of all or substantially all its property, or shall make an assignment for the benefit of creditors, or shall

admit in writing its inability to pay its debts generally as they become due; or

(g) an event of default, as defined in any indenture or trust agreement securing or protecting any Senior Indebtedness, or in any instrument evidencing any such Senior Indebtedness, now or hereafter outstanding, shall happen and be then continuing and such Senior Indebtedness shall be or become due and payable prior to the date on which the same would otherwise become due and payable, and such acceleration shall not be rescinded or annulled or such Senior Indebtedness discharged within 20 days;

then and in each and every such case, so long as such Event of Default shall not have been remedied, unless the principal of all the Debentures shall have already become due and payable, either the Trustee or the holders of not less than 25% in principal amount of the Debentures then outstanding hereunder, by notice in writing to the Company (and to the Trustee if given by the Debentureholders), may declare the principal of all the Debentures then outstanding and the interest accrued thereon, if not already due and payable, to be due and payable immediately, and upon any such declaration the same shall become and shall be immediately due and payable, anything in this Indenture or in the Debentures contained to the contrary notwithstanding. This provision, however, is subject to the condition that if, at any time after the principal of and accrued interest on the Debentures shall have been so declared due and payable, but before the Debentures shall have become due by their terms and before any judgment or decree for the payment of the moneys due shall have been obtained or entered as hereinafter provided, the Company shall pay or shall deposit with the Trustee a sum sufficient to pay all matured instalments of interest upon all the Debentures then outstanding and the principal of (and premium, if any, on) any and all Debentures then outstanding which shall have become due otherwise than by acceleration, with interest upon such principal (and premium, if any) and (to the extent that payment of such interest is enforceable under applicable law) upon overdue instalments of interest, at the rate per annum expressed in the Debentures to the date of such payment or deposit and all amounts payable to the

Trustee under Section 9.06, and any and all defaults under the Indenture, other than the nonpayment of principal on Debentures which shall have become due by acceleration, shall have been remedied or provision shall have been made therefor to the satisfaction of the Trustee—then and in every such case the holders of a majority in aggregate principal amount of the Debentures then outstanding, by written notice to the Company and to the Trustee, may waive all defaults and rescind and annul such declaration and its consequences; but no such waiver or rescission and annulment shall extend to or shall affect any subsequent default, or shall impair any right consequent thereon.

In case the Trustee shall have proceeded to enforce any right under this Indenture and such proceedings shall have been discontinued or abandoned because of such rescission or annulment or for any other reason or shall have been determined adversely to the Trustee, then and in every such case the Company, the Trustee and the Debentureholders shall be restored respectively to their former positions and rights hereunder, and all rights, remedies and powers of the Company, the Trustee and the Debentureholders shall continue as though no such proceedings had been taken.

SECTION 8.02. The Company covenants that (1) in case default shall be made in the payment of any instalment of interest on any of the Debentures, as and when the same shall become due and payable, and such default shall have continued for a period of 30 days, or (2) in case default shall be made in the payment of the principal of (and premium, if any, on) any of the Debentures when the same shall have become due and payable, whether upon maturity of the Debentures or upon redemption or upon declaration as authorized by this Indenture—then, upon demand of the Trustee, the Company will pay to the Trustee, for the benefit of the holders of the Debentures then outstanding, the whole amount that then shall have become due and payable on all such Debentures for principal (and premium, if any) or interest, as the case may be, with interest upon the overdue principal (and premium, if any) and (to the extent that payment of such interest is enforceable under applicable law) upon overdue instalments of interest at the rate per annum expressed in the Debentures; and, in addition thereto, such further amount as shall be sufficient to cover the costs and

expenses of collection, and all amounts payable to the Trustee under Section 9.06.

In case the Company shall fail forthwith to pay such amounts upon such demand, the Trustee, in its own name and as trustee of an express trust, shall be entitled and empowered to institute any action or proceedings at law or in equity for the collection of the sums so due and unpaid, and may prosecute any such action or proceeding to judgment or final decree, and may enforce any such judgment or final decree against the Company or other obligor upon the Debentures and collect in the manner provided and to the extent permitted by law out of the property of the Company or other obligor upon the Debentures wherever situated the moneys adjudged or decreed to be payable.

The Trustee shall be entitled and empowered, either in its own name or as trustee of an express trust, or as attorney-in-fact for the holders of the Debentures, or in any one or more of such capacities, to file such proof of debt, amendment of proof of debt, claim, petition or other document as may be necessary or advisable in order to have the claims of the Trustee and of the holders of the Debentures allowed in any equity receivership, insolvency, bankruptcy, liquidation, readjustment, reorganization or other judicial proceedings relative to the Company or any other obligor on the Debentures or their creditors, or affecting their property. The Trustee is hereby irrevocably appointed (and the successive respective holders of the Debentures by taking and holding the same shall be conclusively deemed to have so appointed the Trustee) the true and lawful attorney-in-fact of the respective holders of the Debentures, with authority to make and file in the respective names of the holders of the Debentures or on behalf of the holders of the Debentures as a class, subject to deduction from any such claims of the amounts of any claims filed by any of the holders of the Debentures themselves, any proof of debt, amendment of proof of debt, claim, petition or other document in any such proceedings and to receive payment of any sums becoming distributable on account thereof, and to execute any such other papers and documents and to do and perform any and all such acts and things for and on behalf of such holders of the Debentures as may be necessary or advisable in the

opinion of the Trustee in order to have the respective claims of the Trustee and of the holders of the Debentures against the Company or its property allowed in any such proceeding, and to receive payment of or on account of such claims; *provided, however,* that nothing contained in this Indenture shall be deemed to give to the Trustee any right to accept or consent to any plan of reorganization or otherwise by action of any character in any such proceeding to waive or change in any way any right of any Debentureholder.

All rights of action and of asserting claims under this Indenture, or under any of the Debentures, may be enforced by the Trustee without the possession of any of the Debentures, or the production thereof on any trial or other proceeding relative thereto, and any such suit or proceeding instituted by the Trustee shall be brought in its own name as trustee of an express trust, and any recovery of judgment shall be for the ratable benefit of the holders of the Debentures, subject to the provisions of this Indenture.

SECTION 8.03. Subject to the provisions of Article Three, any moneys collected by the Trustee pursuant to Section 8.02 shall be applied in the order following, at the date or dates fixed by the Trustee, upon presentation of the several Debentures and stamping thereon the payment, if only partially paid, and upon surrender thereof, if fully paid:

First: To the payment of costs and expenses of collection, and of all amounts payable to the Trustee under Section 9.06;

Second: In case the principal of the outstanding Debentures shall not have become due and be unpaid, to the payment of interest on the Debentures, in the order of the maturity of the instalments of such interest, with interest (so far as may be lawful and if such interest has been collected by the Trustee) upon the overdue instalments of interest at the rate per annum expressed in the Debentures, such payments to be made ratably to the persons entitled thereto, without discrimination or preference;

Third: In case the principal of the outstanding Debentures shall have become due, by declaration as authorized by this Indenture or otherwise, to the payment of the whole amount then owing and unpaid upon the Debentures for principal (and premium, if any) and interest, with interest on the overdue principal (and premium, if any) and (so far as may be lawful and if such interest has been collected by the Trustee) upon overdue instalments of interest at the rate per annum expressed in the Debentures; and in case such moneys shall be insufficient to pay in full the whole amount so due and unpaid upon the Debentures, then to the payment of such principal (and premium, if any) and interest, without preference or priority of principal (and premium, if any) over interest, or of interest over principal (and premium, if any), or of any instalment of interest over any other instalment of interest, or of any Debenture over any other Debenture, ratably to the aggregate of such principal (and premium, if any) and interest; and

Fourth: To the payment of the remainder, if any, to the Company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same, or as a court of competent jurisdiction may direct.

SECTION 8.04. Except as otherwise expressly provided in this Section or Section 8.09, no holder of any Debenture shall have any right by virtue or by availing of any provision of this Indenture or otherwise to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Indenture, for the appointment of a receiver or trustee, for the execution of any trust or power hereof, or for any other remedy hereunder, unless such holder previously shall have given to the Trustee written notice of default and of the continuance thereof, as hereinbefore provided, and unless also the holders of not less than 25% in aggregate principal amount of the Debentures then outstanding shall have made written request upon the Trustee either to proceed to exercise the powers hereinbefore granted or to institute such action, suit or proceeding in its own name

as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities (including reasonable attorneys' fees) to be incurred therein or thereby, and the Trustee within a reasonable time (which in no event shall be less than 60 days) after its receipt of such notice, request and offer of indemnity, shall have failed to proceed to exercise such powers or to institute any such action, suit or proceeding; it being understood and intended, and being expressly covenanted by the taker and holder of every Debenture with every other taker and holder and the Trustee, that no one or more holders of Debentures shall have any right in any manner whatever by virtue or by availing of any provision of this Indenture to affect, disturb or prejudice the rights of the holders of any other of such Debentures, or to obtain or seek to obtain priority over or preference to any other such holder, or to enforce any right under this Indenture, except in the manner herein provided, and that all proceedings in law or in equity shall be instituted, had and maintained in the manner herein provided for the equal, ratable and common benefit of all holders of Debentures. For the protection and enforcement of the provisions of this Section, each and every Debentureholder and the Trustee shall be entitled to such relief as can be given either at law or in equity.

Nothing herein contained shall, however, affect or impair the right, which is absolute and unconditional, of any Debentureholder to receive, and to institute suit to enforce the payment of, the principal of (and premium, if any) and interest on his Debenture or Debentures at and after the respective due date (including maturity by call for redemption, declaration pursuant to this Indenture or otherwise) of such principal (or premium, if any) or interest, or the obligation of the Company, which is also absolute and unconditional, to pay the principal of (and premium, if any) and interest on each of the Debentures to the respective holders thereof at the times and place in the Debentures expressed.

SECTION 8.05. No delay or omission of the Trustee or of any holder of any of the Debentures to exercise any right or power accruing upon any Event of Default shall impair any such right or power, or shall be construed to be a waiver of any such default or an acquiescence

therein; and, subject to the provisions of Section 8.04, every power and remedy given by this Article Eight or by law to the Trustee or to the Debentureholders may be exercised from time to time, and as often as shall be deemed expedient, by the Trustee or by the Debentureholders.

SECTION 8.06. Subject to the provisions of Sections 9.01 and 9.02, the holders of a majority in aggregate principal amount of the Debentures at the time outstanding, determined in accordance with Section 10.04, shall have the right to direct the time, method and place of conducting any proceeding for any remedy available to the Trustee or exercising any trust or power conferred on the Trustee; *provided, however,* that such direction shall not be otherwise than in accordance with law and the provisions of this Indenture, and the Trustee shall have the right, subject to the provisions of Section 9.01, to decline to follow any such direction if the Trustee being advised by counsel determines that the action so directed may not be lawfully taken, or if the Trustee in good faith shall, by a Responsible Officer of the Trustee, determine the proceedings so directed to be illegal or to involve it in personal liability; and *provided, further, however,* that nothing in this Indenture shall impair the right of the Trustee in its discretion to take any action deemed proper by the Trustee and which is not inconsistent with such direction by the Debentureholders.

SECTION 8.07. The Trustee shall give to the Debentureholders, in the manner and to the extent provided in subsection (c) of Section 7.04 with respect to reports pursuant to subsection (a) of said Section 7.04, notice of each default hereunder known to the Trustee within 90 days after the occurrence thereof, unless such default shall have been remedied or cured before the giving of such notice; *provided, however,* that, except in the case of default in the payment of the principal of or interest on any of the Debentures or in the payment of any Sinking Fund Payment pursuant to Section 4.02, the Trustee shall be protected in withholding such notice if and so long as the board of directors, the executive committee, or a trust committee of directors and/or Respon-

sible Officers of the Trustee in good faith determine that the withholding of such notice is in the interests of the Debentureholders.

The term "Default" as used in this Section shall mean the happening of any of the Events of Default specified in Section 8.01, except that, for the purposes of this Section only, there shall be eliminated from the specification of any such Event of Default any reference therein to the giving of written notice or the continuance of any default or any failure on the part of the Company to act, or the continuance in force of any order, judgment, decree, custody or control, for or prior to the expiration of any period of days therein specified.

SECTION 8.08. All parties to this Indenture agree, and each holder of any Debenture by his acceptance thereof shall be deemed to have agreed, that any court may in its discretion require, in any suit for the enforcement of any right or remedy under this Indenture, or in any suit against the Trustee for any action taken or omitted by it as Trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorney's fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant; *provided, however,* that the provisions of this Section shall not apply to any suit instituted by the Trustee, to any suit instituted by any Debentureholder, or group of Debentureholders, holding in the aggregate more than 10% in principal amount of the Debentures outstanding, or to any suit instituted by any Debentureholder for the enforcement of the payment of the principal of (or premium, if any) or interest on any Debenture, on or after the due date expressed in such Debenture or for the enforcement of his right to convert his Debenture into shares of Common Stock as provided in Article Five.

SECTION 8.09. Anything in this Indenture to the contrary notwithstanding, the holder of any Debenture without reference to or the consent of either the Trustee or the holder of any other Debenture, in his own behalf and for his own benefit, may enforce, and may institute and maintain any proceedings suitable to enforce, his right to convert his Debenture into shares of Common Stock as provided in Article Five.

ARTICLE NINE

Concerning the Trustee

Section 9.01. The Trustee, prior to the occurrence of an Event of Default and after the curing of all Events of Default which may have occurred, undertakes to perform such duties and only such duties as are specifically set forth in this Indenture. In case an Event of Default has occurred (which has not been cured) the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

The Trustee, upon receipt of all resolutions, certificates, statements, opinions, reports, documents, orders or other instruments furnished to the Trustee pursuant to any provision of this Indenture, shall examine them to determine whether they conform to the requirements of this Indenture.

No provision of this Indenture shall be construed to relieve the Trustee from liability for its own negligent action, its own negligent failure to act, or its own wilful misconduct, except that

(a) prior to the occurrence of an Event of Default and after the curing of all such Events of Default which may have occurred:

(1) the duties and obligations of the Trustee shall be determined solely by the express provisions of this Indenture, and the Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth in this Indenture, and no implied covenants or obligations shall be read into this Indenture against the Trustee; and

(2) in the absence of bad faith on the part of the Trustee, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon any certificates or opinions furnished to the Trustee and conforming to the requirements of this Indenture;

(b) the Trustee shall not be personally liable for any error of judgment made in good faith by a Responsible Officer of the Trustee, unless it shall be proved that the Trustee was negligent in ascertaining the pertinent facts;

(c) the Trustee shall not be personally liable with respect to any action taken or omitted to be taken by it in good faith in accordance with the direction of the holders of a majority in principal amount of the Debentures at the time outstanding (determined as provided in Section 10.04) relating to the time, method and place of conducting any proceeding for any remedy available to the Trustee, or exercising any trust or power conferred upon the Trustee, under this Indenture; and

(d) none of the provisions of this Indenture shall require the Trustee to expend or risk its own funds or otherwise incur any personal financial liability in the performance of any of its duties hereunder, or in the exercise of any of its rights or powers, if it shall have reasonable grounds for believing that repayment of such funds or adequate indemnity against such risk or liability is not reasonably assured to it.

SECTION 9.02. Except as otherwise provided in Section 9.01:

(a) The Trustee may rely and shall be protected in acting or refraining from action upon any resolution, Officers' Certificate, certificate of auditors, or any other certificate, statement, instrument, opinion, report, notice, request, consent, order, appraisal, bond, debenture or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties;

(b) Any request, direction, order or demand of the Company mentioned herein shall be sufficiently evidenced by an instrument signed in the name of the Company by the President or any Vice President and the Secretary or an Assistant Secretary or the Treasurer or an Assistant Treasurer (unless other evidence in respect thereof be herein specifically prescribed); and any resolu-

tion of the Board of Directors may be evidenced to the Trustee by a copy thereof certified by the Secretary or an Assistant Secretary of the Company;

(c) The Trustee may consult with counsel and any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by it hereunder in good faith and in accordance with such Opinion of Counsel;

(d) The Trustee shall be under no obligation to exercise any of the trusts or powers vested in it by this Indenture or to institute, conduct or defend any litigation hereunder or in relation hereto at the request, order or direction of any of the Debentureholders, pursuant to the provisions of this Indenture, unless such Debentureholders shall have offered to the Trustee reasonable security or indemnity against the costs, expenses and liabilities which may be incurred therein or thereby; nothing herein contained shall, however, relieve the Trustee of the obligation, upon the occurrence of an Event of Default (which has not been cured) to exercise such of the rights and powers vested in it by this Indenture, and to use the same degree of care and skill in their exercise as a prudent man would exercise or use under the circumstances in the conduct of his own affairs;

(e) The Trustee shall not be personally liable for any action taken or omitted by it in good faith and believed by it to be authorized or within the discretion or rights or powers conferred upon it by this Indenture;

(f) Prior to the occurrence of an Event of Default hereunder and after the curing of all Events of Default, the Trustee shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, approval, bond, debenture or other paper or document, unless requested in writing so to do by the holders of a majority in principal amount of the Debentures then outstanding; *provided, however,* that if the payment within a

reasonable time to the Trustee of the costs, expenses or liabilities likely to be incurred by it in the making of such investigation is, in the opinion of the Trustee, not reasonably assured to the Trustee by the security conferred upon it by the terms of this Indenture, the Trustee may require reasonable indemnity against such costs, expenses or liabilities as a condition to so proceeding; and the reasonable expense for such investigation shall be paid by the Company or, if paid by the Trustee, shall be repaid by the Company upon demand; and

(g) The Trustee may execute any of the trusts or powers hereunder or perform any duties hereunder either directly or by or through agents or attorneys.

SECTION 9.03. The recitals contained herein and in the Debentures (other than the certificate of authentication on the Debentures) shall be taken as the statements of the Company, and the Trustee assumes no responsibility for the correctness of the same. The Trustee makes no representations as to the validity or sufficiency of this Indenture or of the Debentures. The Trustee shall not be accountable for the use or application by the Company of any of the Debentures or of the proceeds of the Debentures, or for the use or application of any moneys paid over by the Trustee in accordance with any provision of this Indenture, or for the use or application of any moneys received by any paying agent other than the Trustee.

SECTION 9.04. The Trustee or any paying agent or any conversion agent or any Debenture registrar, in its individual or any other capacity, may become the owner or pledgee of Debentures with the same rights it would have if it were not Trustee, paying agent, conversion agent or Debenture registrar.

SECTION 9.05. All moneys received by the Trustee shall, until used or applied as herein provided, be held in trust for the purposes for which they were received, but need not be segregated from other funds except to the extent required by law. The Trustee shall be under no

liability for interest on any moneys received by it hereunder except such as it may agree with the Company to pay thereon. So long as no Event of Default shall have occurred and be continuing, all interest allowed on any such moneys shall be paid from time to time upon the written order of the Company signed by its President or any Vice President or its Treasurer or an Assistant Treasurer.

SECTION 9.06. The Company covenants and agrees to pay to the Trustee from time to time, and the Trustee shall be entitled to, reasonable compensation (which shall not be limited by any provision of law in regard to the compensation of a trustee of an express trust) for all services rendered by it in the execution of the trusts hereby created and in the exercise and performance of any of the powers and duties hereunder of the Trustee, and the Company will pay or reimburse the Trustee upon its request for all reasonable expenses, disbursements and advances incurred or made by the Trustee in accordance with any of the provisions of this Indenture (including the reasonable compensation and the expenses and disbursements of its counsel and of all persons not regularly in its employ) except any such expense, disbursement or advance as may arise from its negligence or bad faith. The Company also covenants to indemnify the Trustee for, and to hold it harmless against, any loss, liability or expense incurred without negligence or bad faith on the part of the Trustee, and arising out of or in connection with the acceptance or administration of this trust, including the costs and expenses of defending itself against any claim of liability in the premises. The obligations of the Company under this Section to compensate and indemnify the Trustee and to pay or reimburse the Trustee for expenses, disbursements and advances shall constitute additional indebtedness hereunder and shall survive the satisfaction and discharge of this Indenture. Such additional indebtedness shall be secured by a lien prior to that of the Debentures upon all property and funds held or collected by the Trustee as such, except funds held in trust for the benefit of the holders of particular Debentures.

SECTION 9.07. Except as otherwise provided in Section 9.01, whenever in the administration of the trusts of this Indenture the Trustee shall deem it necessary or desirable that a matter be proved or established prior to taking or suffering or omitting any action hereunder,

such matter (unless other evidence in respect thereof be herein specifically prescribed) may be deemed to be conclusively proved and established by an Officers' Certificate, and such certificate shall be full warrant to the Trustee for any action taken, suffered or omitted by it under the provisions of this Indenture upon the faith thereof.

SECTION 9.08. (a) If the Trustee has or shall acquire any conflicting interest, as defined in this Section, it shall, within 90 days after ascertaining that it has such conflicting interest, either eliminate such conflicting interest or resign in the manner provided in Section 9.10(a), such resignation to become effective upon the appointment of a successor trustee and such successor's acceptance of such appointment, and the Company shall take prompt steps to have a successor appointed in the manner provided in Section 9.10.

(b) In the event that the Trustee shall fail to comply with the provisions of subsection (a) of this Section, the Trustee shall, within ten days after the expiration of such 90-day period, transmit notice of such failure to the Debentureholders in the manner and to the extent provided in subsection (c) of Section 7.04 with respect to reports pursuant to subsection (a) of said Section 7.04. Subject to the provisions of Section 8.08, any Debentureholder who has been a bona fide holder of a Debenture for at least six months may, on behalf of himself and all others similarly situated, petition any court of competent jurisdiction for the removal of the Trustee, and the appointment of a successor trustee, if the Trustee shall fail, after written request therefor by such holder, to comply with the provisions of subsection (a) of this Section.

(c) For the purposes of this Section the Trustee shall be deemed to have a conflicting interest if

(1) the Trustee is trustee under another indenture under which any other securities, or certificates of interest or participation in any other securities, of the Company are outstanding, unless such other indenture is a collateral trust indenture under which the only collateral consists of Debentures issued under this Indenture, provided that there shall be excluded from the operation of this paragraph any other indenture or indentures under

which other securities, or certificates of interest or participation in other securities, of the Company are outstanding if (i) this Indenture and such other indenture or indentures are at the time wholly unsecured and such other indenture or indentures are hereafter qualified under the Trust Indenture Act of 1939, unless the Securities and Exchange Commission shall have found and declared by order pursuant to subsection (b) of Section 305 or subsection (c) of Section 307 of said Trust Indenture Act of 1939 that differences exist between the provisions of this Indenture and the provisions of such other indenture or indentures which are so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify the Trustee from acting as such under one of such indentures, or (ii) the Company shall have sustained the burden of proving, on application to the Securities and Exchange Commission and after opportunity for hearing thereon, that trusteeship under this Indenture and such other indenture or indentures is not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify the Trustee from acting as such under one of such indentures;

(2) the Trustee or any of its directors or executive officers is an obligor upon the Debentures or an underwriter for the Company;

(3) the Trustee directly or indirectly controls or is directly or indirectly controlled by or is under direct or indirect common control with the Company or an underwriter for the Company;

(4) the Trustee or any of its directors or executive officers is a director, officer, partner, employee, appointee, or representative of the Company, or of an underwriter (other than the Trustee itself) for the Company who is currently engaged in the business of underwriting, except that (A) one individual may be a director and/or an executive officer of the Trustee and a director and/or an executive officer of the Company, but may not be at the same time an executive officer of both the Trustee and the Company; and (B) if and so long as the number of directors of the Trustee in office is more than nine, one additional

individual may be a director and/or an executive officer of the Trustee and a director of the Company; and (C) the Trustee may be designated by the Company or by any underwriter for the Company to act in the capacity of transfer agent, registrar, custodian, paying agent, fiscal agent, escrow agent, or depositary or in any other similar capacity, or, subject to the provisions of paragraph (1) of this subsection (c), to act as trustee whether under an indenture or otherwise;

(5) 10% or more of the voting securities of the Trustee is beneficially owned either by the Company or by any director, partner, or executive officer thereof, or 20% or more of such voting securities is beneficially owned, collectively, by any two or more of such persons; or 10% or more of the voting securities of the Trustee is beneficially owned either by an underwriter for the Company or by any director, partner, or executive officer thereof, or is beneficially owned, collectively, by any two or more such persons;

(6) the Trustee is the beneficial owner of, or holds as collateral security for an obligation which is in default (as hereinafter in this subsection (c) defined), (A) 5% or more of the voting securities, or 10% or more of any other class of security, of the Company, not including the Debentures issued under this Indenture and securities issued under any other indenture under which the Trustee is also trustee, or (B) 10% or more of any class of security of an underwriter for the Company;

(7) the Trustee is the beneficial owner of, or holds as collateral security for an obligation which is in default (as hereinafter in this subsection (c) defined), 5% or more of the voting securities of any person who, to the knowledge of the Trustee, owns 10% or more of the voting securities of, or controls directly or indirectly or is under direct or indirect common control with, the Company;

(8) the Trustee is the beneficial owner of, or holds as collateral security for an obligation which is in default (as hereinafter in this subsection (c) defined), 10% or more of any class

of security of any person who, to the knowledge of the Trustee, owns 50% or more of the voting securities of the Company; or

(9) the Trustee owns on May 15 in any calendar year, in the capacity of executor, administrator, testamentary or inter vivos trustee, guardian, committee or conservator, or in any other similar capacity, an aggregate of 25% or more of the voting securities, or of any class of security, of any person, the beneficial ownership of a specified percentage of which would have constituted a conflicting interest under paragraph (6), (7) or (8) of this subsection (c). As to any such securities of which the Trustee acquired ownership through becoming executor, administrator or testamentary trustee of an estate which included them, the provisions of the preceding sentence shall not apply, for a period of not more than two years from the date of such acquisition, to the extent that such securities included in such estate do not exceed 25% of such voting securities or 25% of any such class of security. Promptly after May 15 in each calendar year the Trustee shall make a check of its holdings of such securities in any of the above-mentioned capacities as of such May 15. If the Company fails to make payment in full of principal of (or premium, if any) or interest on any of the Debentures when and as the same become due and payable, and such failure continues for 30 days thereafter, the Trustee shall make a prompt check of its holdings of such securities in any of above-mentioned capacities as of the date of the expiration of such 30-day period, and after such date, notwithstanding the foregoing provisions of this paragraph (9), all such securities so held by the Trustee, with sole or joint control over such securities vested in it, shall, but only so long as such failure shall continue, be considered as though beneficially owned by the Trustee for the purposes of paragraphs (6), (7) and (8) of this subsection (c).

The specifications of percentages in paragraphs (5) to (9), inclusive, of this subsection (c) shall not be construed as indicating that the ownership of such percentages of the securities of a person is or is not

necessary or sufficient to constitute direct or indirect control for the purposes of paragraphs (3) or (7) of this subsection (c).

For the purposes of paragraphs (6), (7), (8) and (9) of this subsection (c), (A) the terms "security" and "securities" shall include only such securities as are generally known as corporate securities, but shall not include any note or other evidence of indebtedness issued to evidence an obligation to repay moneys lent to a person by one or more banks, trust companies or banking firms, or any certificate of interest or participation in any such note or evidence of indebtedness; (B) an obligation shall be deemed to be in default when a default in payment of principal shall have continued for 30 days or more and shall not have been cured; and (C) the Trustee shall not be deemed to be the owner or holder of (i) any security which it holds as collateral security (as trustee or otherwise) for an obligation which is not in default as defined in clause (B) above, or (ii) any security which it holds as collateral security under this Indenture, irrespective of any default hereunder, or (iii) any security which it holds as agent for collection, or as custodian, escrow agent, or depositary, or in any similar representative capacity.

Except as provided in the next preceding paragraph hereof, the word "security" or "securities" as used in this Indenture shall mean any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of, or warrant or right to subscribe to or purchase, any of the foregoing.

(d) For the purposes of this Section:

(1) The term "underwriter" when used with reference to the Company shall mean every person, who, within three years prior to

the time as of which the determination is made, has purchased from the Company with a view to, or has offered or has sold for the Company in connection with, the distribution of any security of the Company outstanding at such time, or has participated or has had a direct or indirect participation in any such undertaking, or has participated or has had a participation in the direct or indirect underwriting of any such undertaking, but such term shall not include a person whose interest was limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission.

(2) The term "director" shall mean any director of a corporation or any individual performing similar functions with respect to any organization whether incorporated or unincorporated.

(3) The term "person" shall mean an individual, a corporation, a partnership, an association, a joint-stock company, a trust, an unincorporated organization, or a government or political subdivision thereof. As used in this paragraph, the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(4) The term "voting security" shall mean any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a person, or any security issued under or pursuant to any trust, agreement or arrangement whereby a trustee or trustees or agent or agents for the owner or holder of such security are presently entitled to vote in the direction or management of the affairs of a person.

(5) The term "Company" shall mean any obligor upon the Debentures.

(6) The term "executive officer" shall mean the president, every vice president, every trust officer, the cashier, the secretary and the treasurer of a corporation, and any individual customarily performing similar functions with respect to any organization

whether incorporated or unincorporated, but shall not include the chairman of the board of directors.

The percentages of voting securities and other securities specified in this Section shall be calculated in accordance with the following provisions:

(A) A specified percentage of the voting securities of a person means such amount of the outstanding voting securities of such person as entitles the holder or holders thereof to cast such specified percentage of the aggregate votes which the holders of all the outstanding voting securities of such person are entitled to cast in the direction or management of the affairs of such person.

(B) A specified percentage of a class of securities of a person means such percentage of the aggregate amount of securities of the class outstanding.

(C) The term "amount", when used in regard to securities, means the principal amount if relating to evidences of indebtedness, the number of shares if relating to capital shares, and the number of units if relating to any other kind of security.

(D) The term "outstanding" means issued and not held by or for the account of the issuer. The following securities shall not be deemed outstanding within the meaning of this definition:

(i) securities of an issuer held in a sinking fund relating to securities of the issuer of the same class,

(ii) securities of an issuer held in a sinking fund relating to another class of securities of the issuer, if the obligation evidenced by such other class of securities is not in default as to principal or interest or otherwise,

(iii) securities pledged by the issuer thereof as security for an obligation of the issuer not in default as to principal or interest or otherwise, and

(iv) securities held in escrow if placed in escrow by the issuer thereof;

provided, however, that any voting securities of an issuer shall be deemed outstanding if any person other than the issuer is entitled to exercise the voting rights thereof.

(E) A security shall be deemed to be of the same class as another security if both securities confer upon the holder or holders thereof substantially the same rights and privileges; *provided, however,* that, in the case of secured evidences of indebtedness, all of which are issued under a single indenture, differences in the interest rates or maturity dates of various series thereof shall not be deemed sufficient to constitute such series different classes; and, *provided, further,* that, in the case of unsecured evidences of indebtedness, differences in the interest rates or maturity dates thereof shall not be deemed sufficient to constitute them securities of different classes, whether or not they are issued under a single indenture.

SECTION 9.09. The Trustee hereunder shall at all times be a corporation organized and doing business under the laws of the United States or of any State or Territory or of the District of Columbia authorized under such laws to exercise corporate trust powers, having a combined capital and surplus of at least $5,000,000, and subject to supervision or examination by Federal, State, Territorial, or District of Columbia authority. If such corporation publishes reports of condition at least annually, pursuant to law or to the requirements of the aforesaid supervising or examining authority, then for the purposes of this Section the combined capital and surplus of such corporation shall be deemed to be its combined capital and surplus as set forth in its most recent report of condition so published. In case at any time the Trustee shall cease to be eligible in accordance with the provisions of this Section, the Trustee shall resign immediately in the manner and with the effect specified in Section 9.10.

SECTION 9.10. (a) The Trustee, or any successor hereafter appointed, may at any time resign and be discharged from the trust

hereby created by giving written notice thereof to the Company and to the holders of the Debentures at their last addresses as they shall appear in the Debenture register. Upon receiving such notice of resignation, the Company shall promptly appoint a successor trustee by written instrument, in duplicate, executed by order of the Board of Directors, one copy of which instrument shall be delivered to the resigning Trustee and one copy to the successor trustee. If no successor trustee shall have been so appointed and have accepted appointment within thirty days after the mailing of such notice of resignation, the resigning Trustee may petition any court of competent jurisdiction for the appointment of a successor trustee, or any Debentureholder who has been a bona fide holder of a Debenture or Debentures for at least six months may, subject to the provisions of Section 8.08, on behalf of himself and all others similarly situated, petition any such court for the appointment of a successor trustee. Such court may thereupon, after such notice, if any, as it may deem proper and prescribe, appoint a successor trustee.

(b) In case at any time any of the following shall occur—

(1) the Trustee shall fail to comply with the provisions of subsection (a) of Section 9.08 after written request therefor by the Company or by any Debentureholder who has been a bona fide holder of a Debenture or Debentures for at least six months,

(2) the Trustee shall cease to be eligible in accordance with the provisions of Section 9.09 and shall fail to resign after written request therefor by the Company or by any such Debentureholder, or

(3) the Trustee shall become incapable of acting, or shall be adjudged a bankrupt or insolvent, or a receiver of the Trustee or of its property shall be appointed, or any public officer shall take charge or control of the Trustee or of its property or affairs for the purpose of rehabilitation, conservation or liquidation,

then, in any such case, the Company may remove the Trustee and appoint a successor trustee by written instrument, in duplicate, executed

by order of the Board of Directors, one copy of which instrument shall be delivered to the Trustee so removed and one copy to the successor trustee, or, subject to the provisions of Section 8.08, any Debentureholder who has been a bona fide holder of a Debenture or Debentures for at least six months may, on behalf of himself and all others similarly situated, petition any court of competent jurisdiction for the removal of the Trustee and the appointment of a successor trustee. Such court may thereupon after such notice, if any, as it may deem proper and prescribe, remove the Trustee and appoint a successor trustee.

(c) The holders of a majority in aggregate principal amount of the Debentures at the time outstanding may at any time remove the Trustee and appoint a successor trustee by written instrument or instruments, in duplicate, signed by such holders or their attorneys-in-fact duly authorized, one complete set of which instruments shall be delivered to the Trustee so removed and one complete set to the successor so appointed.

(d) Any resignation or removal of the Trustee and appointment of a successor trustee pursuant to any of the provisions of this Section shall become effective upon acceptance of appointment by the successor trustee as provided in Section 9.11.

SECTION 9.11. Any successor trustee appointed as provided in Section 9.10 shall execute, acknowledge and deliver to the Company and to its predecessor trustee an instrument accepting such appointment hereunder, and thereupon the resignation or removal of the predecessor trustee shall become effective and such successor trustee, without any further act, deed or conveyance, shall become fully vested with all the rights, powers, duties and obligations of its predecessor hereunder, with like effect as if originally named as trustee herein. The predecessor trustee upon payment to it of all amounts due it under Section 9.06 shall, nevertheless, at the written request of the Company or the successor trustee, pay over to the successor trustee all moneys at

the time held by it hereunder; and the Company and the predecessor trustee shall execute and deliver such instruments and do such other things as may reasonably be required for more fully and certainly vesting and confirming in the successor trustee all such rights, powers, duties and obligations.

No successor trustee shall accept appointment as provided in this Section unless at the time of such acceptance such successor trustee shall be qualified under the provisions of Section 9.08 and eligible under the provisions of Section 9.09.

Upon acceptance of appointment by a successor trustee as provided in this Section, the Company shall mail notice of the succession of such trustee hereunder to the holders of the Debentures at their last addresses as they shall appear in the Debenture register. If the Company fails to mail such notice within ten days after acceptance of appointment by the successor trustee, the successor trustee shall cause such notice to be mailed at the expense of the Company.

SECTION 9.12. Any corporation into which the Trustee may be merged or with which it may be consolidated, or any corporation resulting from any merger or consolidation to which the Trustee shall be a party, or any corporation succeeding to the corporate trust business of the Trustee, shall be the successor of the Trustee hereunder, provided such corporation shall be qualified under the provisions of Section 9.08 and eligible under the provisions of Section 9.09, without the execution or filing of any paper or any further act on the part of any of the parties hereto, anything herein to the contrary notwithstanding.

SECTION 9.13. (a) Subject to the provisions of subsection (b) of this Section, if the Trustee in its individual capacity shall be or shall become a creditor, directly or indirectly, secured or unsecured, of the Company or of any other obligor on the Debentures within four months prior to a default, as defined in subsection (c) of this Section, or subsequent to such a default, then, unless and until such default shall be cured, the Trustee shall set apart and hold in a special account for

the benefit of the Trustee individually, the holders of the Debentures and the holders of other indenture securities (as defined in subsection (c) of this Section):

(1) an amount qual to any and all reductions in the amount due and owing upon any claim as such creditor in respect of principal or interest, effected after the beginning of such four months' period and valid as against the Company and its other creditors, except any such reduction resulting from the receipt or disposition of any property described in paragraph (2) of this subsection (a), or from the exercise of any right of set-off which the Trustee could have exercised if a petition in bankruptcy had been filed by or against the Company upon the date of such default; and

(2) all property received by the Trustee in respect of any claim as such creditor, either as security therefor, or in satisfaction or composition thereof, or otherwise, after the beginning of such four months' period, or an amount equal to the proceeds of any such property, if disposed of, subject, however, to the rights, if any, of the Company and its other creditors in such property or such proceeds.

Nothing herein contained, however, shall affect the right of the Trustee

(A) to retain for its own account (i) payments made on account of any such claim by any person (other than the Company) who is liable thereon, and (ii) the proceeds of the bona fide sale of any such claim by the Trustee to a third person, and (iii) distributions made in cash, securities, or other property in respect of claims filed against the Company in bankruptcy or receivership or in proceedings for reorganization pursuant to the Federal Bankruptcy Act or applicable State law;

(B) to realize, for its own account, upon any property held by it as security for any such claim, if such property was so held prior to the beginning of such four months' period;

(C) to realize, for its own account, but only to the extent of the claim hereinafter mentioned, upon any property held by it as security for any such claim, if such claim was created after the beginning of such four months' period and such property was received as security therefor simultaneously with the creation thereof, and if the Trustee shall sustain the burden of proving that at the time such property was so received the Trustee had no reasonable cause to believe that a default, as defined in subsection (c) of this Section, would occur within four months; or

(D) to receive payment on any claim referred to in paragraph (B) or (C), against the release of any property held as security for such claim as provided in such paragraph (B) or (C), as the case may be, to the extent of the fair value of such property.

For the purposes of paragraphs (B), (C) and (D), property substituted after the beginning of such four months' period for property held as security at the time of such substitution shall, to the extent of the fair value of the property released, have the same status as the property released, and, to the extent that any claim referred to in any of such paragraphs is created in renewal of or in substitution for or for the purpose of repaying or refunding any pre-existing claim of the Trustee as such creditor, such claim shall have the same status as such pre-existing claim.

If the Trustee shall be required to account, the funds and property held in such special account and the proceeds thereof shall be apportioned between the Trustee, the Debentureholders and the holders of other indenture securities in such manner that the Trustee, the Debentureholders and the holders of other indenture securities realize, as a result of payments from such special account and payments of dividends on claims filed against the Company in bankruptcy or receivership or in proceedings for reorganization pursuant to the Federal Bankruptcy Act or applicable State law, the same percentage of their respective claims, figured before crediting to the claim of the Trustee anything on account of the receipt by it from the Company of the funds and property in such special account and before crediting to the respective claims

of the Trustee, the Debentureholders and the holders of other indenture securities dividends on claims filed against the Company in bankruptcy or receivership or in proceedings for reorganization pursuant to the Federal Bankruptcy Act or applicable State law, but after crediting thereon receipts on account of the indebtedness represented by their respective claims from all sources other than from such dividends and from the funds and property so held in such special account. As used in this paragraph, with respect to any claim, the term "dividends" shall include any distribution with respect to such claim, in bankruptcy or receivership or in proceedings for reorganization pursuant to the Federal Bankruptcy Act or applicable State law, whether such distribution is made in cash, securities, or other property, but shall not include any such distribution with respect to the secured portion, if any, of such claim. The court in which such bankruptcy, receivership or proceeding for reorganization is pending shall have jurisdiction (i) to apportion between the Trustee, the Debentureholders and the holders of other indenture securities, in accordance with the provisions of this paragraph, the funds and property held in such special account and the proceeds thereof, or (ii) in lieu of such apportionment, in whole or in part, to give to the provisions of this paragraph due consideration in determining the fairness of the distributions to be made to the Trustee, the Debentureholders and the holders of other indenture securities with respect to their respective claims, in which event it shall not be necessary to liquidate or to appraise the value of any securities or other property held in such special account or as security for any such claim, or to make a specific allocation of such distributions as between the secured and unsecured portions of such claims, or otherwise to apply the provisions of this paragraph as a mathematical formula.

Any Trustee who has resigned or been removed after the beginning of such four months' period shall be subject to the provisions of this subsection (a) as though such resignation or removal had not occurred. If any Trustee has resigned or been removed prior to the beginning of such four months' period, it shall be subject to the provisions of this subsection (a) if and only if the following conditions exist:

(i) the receipt of property or reduction of claim which would have given rise to the obligation to account, if such Trustee had continued as Trustee, occurred after the beginning of such four months' period; and

(ii) such receipt of property or reduction of claim occurred within four months after such resignation or removal.

(b) There shall be excluded from the operation of subsection (a) of this Section a creditor relationship arising from

(1) the ownership or acquisition of securities issued under any indenture, or any security or securities having a maturity of one year or more at the time of acquisition by the Trustee;

(2) advances authorized by a receivership or bankruptcy court of competent jurisdiction, or by this Indenture, for the purpose of preserving any property which shall at any time be subject to the lien of this Indenture or of discharging tax liens or other prior liens or encumbrances thereon, if notice of such advance and of the circumstances surrounding the making thereof is given to the Debentureholders at the time and in the manner provided in Section 7.04 of this Indenture;

(3) disbursements made in the ordinary course of business in the capacity of trustee under an indenture, transfer agent, registrar, custodian, conversion agent, paying agent, fiscal agent or depositary, or other similar capacity;

(4) an indebtedness created as a result of services rendered or premises rented; or an indebtedness created as a result of goods or securities sold in a cash transaction as defined in subsection (c) of this Section;

(5) the ownership of stock or of other securities of a corporation organized under the provisions of Section 25(a) of the Federal Reserve Act, as amended, which is directly or indirectly a creditor of the Company; or

(6) the acquisition, ownership, acceptance or negotiation of any drafts, bills of exchange, acceptances or obligations which fall within the classification of self-liquidating paper as defined in subsection (c) of this Section.

(c) As used in this Section:

(1) The term "default" shall mean any failure to make payment in full of the principal of or interest upon any of the Debentures or upon the other indenture securities when and as such principal or interest becomes due and payable.

(2) The term "other indenture securities" shall mean securities upon which the Company is an obligor (as defined in the Trust Indenture Act of 1939) outstanding under any other indenture (A) under which the Trustee is also trustee, (B) which contains provisions substantially similar to the provisions of subsection (a) of this Section, and (C) under which a default exists at the time of the apportionment of the funds and property held in said special account.

(3) The term "cash transaction" shall mean any transaction in which full payment for goods or securities sold is made within seven days after delivery of the goods or securities in currency or in checks or other orders drawn upon banks or bankers and payable upon demand.

(4) The term "self-liquidating paper" shall mean any draft, bill of exchange, acceptance or obligation which is made, drawn, negotiated or incurred by the Company for the purpose of financing the purchase, processing, manufacture, shipment, storage or sale of goods, wares or merchandise and which is secured by documents evidencing title to, possession of, or a lien upon, the goods, wares or merchandise or the receivables or proceeds arising from the sale of the goods, wares or merchandise previously constituting the security, provided the security is received by the Trustee simultaneously with the creation of the creditor relationship with the

Company arising from the making, drawing, negotiating or incurring of the draft, bill of exchange, acceptance or obligation.

(5) The term "Company" shall mean any obligor upon the Debentures.

ARTICLE TEN

Concerning the Debentureholders

Section 10.01. Whenever in this Indenture it is provided that the holders of a specified percentage in aggregate principal amount of the Debentures may take action (including the making of any demand or request, the giving of any notice, consent or waiver or the taking of any other action) the fact that at the time of taking any such action the holders of such specified percentage have joined therein may be evidenced (a) by any instrument or any number of instruments of similar tenor executed by Debentureholders in person or by an agent, legal representative or proxy appointed in writing, or (b) by the record of the holders of Debentures voting in favor thereof at any meeting of Debentureholders duly called and held in accordance with the provisions of Article Eleven or (c) by a combination of such instrument or instruments and any such record of such a meeting of Debentureholders.

Section 10.02. Subject to the provisions of Section 11.05, proof of the execution of any instrument by a Debentureholder or his agent, legal representative or proxy and proof of the holding by any person of any of the Debentures shall be sufficient for any purpose of this Indenture if made in the following manner:

(a) The fact and date of the execution by any such person of any instrument may be proved (i) by the certificate of any notary public or other officer of any jurisdiction of or within the United States of America authorized to take acknowledgments of deeds, that the person executing such instrument acknowledged to him the execution thereof, or (ii) by an affidavit of a witness to such execution sworn to before any such notary or other such

officer, or (iii) in any other manner which the Trustee may deem sufficient. Where such execution is by an officer of a corporation or association or a member of a partnership on behalf of such corporation, association or partnership, such certificate or affidavit shall also constitute sufficient proof of his authority.

(b) The ownership of Debentures shall be proved by the register of such Debentures or by a certificate of any duly appointed registrar thereof.

The Trustee shall not be bound to recognize any person as a Debentureholder unless and until his title to the Debentures held by him is proved in the manner in this Article Ten provided.

The record of any Debentureholders' meeting shall be proved in the manner provided in Section 11.06.

The Trustee may require such additional proof of any matter referred to in this Section as it shall deem necessary.

SECTION 10.03. The Company, the Trustee, any paying agent, any conversion agent and any Debenture registrar may deem and treat the person in whose name any Debenture shall be registered as the absolute owner thereof (whether or not such Debenture shall be overdue and notwithstanding any notice of ownership or writing thereon made by anyone other than the Company or any Debenture registrar) for the purpose of receiving payment of or on account of the principal of, and interest (subject to the provisions of Section 2.03) and premium, if any, on such Debenture, and for all other purposes; and neither the Company nor the Trustee nor any paying agent nor any conversion agent nor any Debenture registrar shall be affected by any notice to the contrary. All such payments so made to any such registered holder for the time being or upon his order shall be valid, and, to the extent of the sum or sums so paid, effectual to satisfy and discharge the liability for moneys payable upon any such Debenture.

SECTION 10.04. In determining whether the holders of the requisite aggregate principal amount of Debentures have concurred in any

direction, consent or waiver under this Indenture, Debentures which are owned by the Company or any other obligor on the Debentures or by any person directly or indirectly controlling or controlled by or under direct or indirect common control with the Company or any other obligor on the Debentures shall be disregarded and deemed not to be outstanding for the purpose of any such determination, except that for the purpose of determining whether the Trustee shall be protected in relying on any such direction, consent or waiver only Debentures which the Trustee knows are so owned shall be so disregarded. Debentures so owned which have been pledged in good faith may be regarded as outstanding for the purposes of this Section if the pledgee shall establish to the satisfaction of the Trustee the pledgee's right to vote such Debentures and that the pledgee is not a person directly or indirectly controlling or controlled by or under direct or indirect common control with the Company or any such other obligor. In case of a dispute as to such right, any decision by the Trustee taken upon the advice of counsel shall be full protection to the Trustee.

SECTION 10.05. Any demand, request, waiver, consent or vote of the holder of any Debenture shall be conclusive and binding upon such holder and upon all future holders and owners of such Debentures, and of any Debenture issued in exchange therefor or in place thereof, irrespective of whether or not any notation in regard thereto is made upon such Debenture. Any action taken by the holders of the majority, or a percentage in aggregate principal amount of the Debentures specified in this Indenture in connection with such action, shall be conclusively binding upon the Company, the Trustee and the holders of all the Debentures.

ARTICLE ELEVEN

DEBENTUREHOLDERS' MEETINGS

SECTION 11.01. A meeting of Debentureholders may be called at any time and from time to time pursuant to the provisions of this Article Eleven for any of the following purposes:

(a) to give any notice to the Company or to the Trustee, or to give any directions to the Trustee, or waive any default hereunder and its consequences, or to take any other action authorized to be taken by Debentureholders pursuant to any of the provisions of Article Eight;

(b) to remove the Trustee and appoint a successor trustee pursuant to the provisions of Article Nine;

(c) to consent to the execution of an indenture or indentures supplemental hereto pursuant to the provisions of Section 12.02; or

(d) to take any other action authorized to be taken by or on behalf of the holders of any specified aggregate principal amount of the Debentures under any other provision of this Indenture, or authorized or permitted by law.

SECTION 11.02. The Trustee may at any time call a meeting of Debentureholders to take any action specified in Section 11.01, to be held at such time and at such place in the Borough of Manhattan, The City of New York, State of New York, as the Trustee shall determine. Notice of every meeting of the Debentureholders, setting forth the time and the place of such meeting and in general terms the action proposed to be taken at such meeting, shall be mailed to the holders of Debentures, at their last addresses as they shall appear upon the register or registers provided for in Section 2.05, not less than 15 nor more than 90 days prior to the date fixed for the meeting.

Any meeting of Debentureholders shall be valid without notice if the holders of all Debentures then outstanding are present in person or by proxy or if notice is waived before or after the meeting by the holders of all Debentures outstanding, and if the Company and the Trustee are either present by duly authorized representatives or have, before or after the meeting, waived notice.

SECTION 11.03. In case at any time the Company, pursuant to a resolution of its Board of Directors, or the holders of at least 20% in aggregate principal amount of the Debentures then outstanding shall

have requested the Trustee to call a meeting of Debentureholders, by written request setting forth in reasonable detail the action proposed to be taken at the meeting, and the Trustee shall not have mailed notice of such meeting within 20 days after receipt of such request, then the Company or the holders of Debentures in the amount above specified may determine the time and place in the Borough of Manhattan, The City of New York, State of New York, for such meeting and may call such meeting to take any action authorized in Section 11.01, by giving notice thereof as provided in Section 11.02.

SECTION 11.04. To be entitled to vote at any meeting of Debentureholders a person shall (a) be a holder of one or more Debentures or (b) be a person appointed by an instrument in writing as proxy for the holder or holders of Debentures by a holder of one or more Debentures. The only person who shall be entitled to be present or to speak at any meeting of Debentureholders shall be the persons entitled to vote at such meeting and their counsel and any representatives of the Trustee and its counsel and any representatives of the Company and its counsel.

SECTION 11.05. Notwithstanding any other provisions of this Indenture, the Trustee may make such reasonable regulations as it may deem advisable for any meeting of Debentureholders, in regard to the appointment of proxies and in regard to the appointment and duties of inspectors of votes, the submission and examination of proxies, certificates and other evidences of the right to vote, and such other matters concerning the conduct of the meeting as it shall think fit. Except as otherwise permitted or required by any such regulations, the holding of Debentures shall be proved in the manner specified in Section 10.02 and the appointment of any proxy shall be proved in the manner specified in said Section 10.02 or by having the signature of the person executing the proxy witnessed or guaranteed by any bank, banker, trust company, or member firm of the New York Stock Exchange deemed by the Trustee to be satisfactory.

The Trustee shall, by an instrument in writing, appoint a temporary chairman of the meeting, unless the meeting shall have been called by the Company or by Debentureholders as provided in Section 11.03, in which case the Company or the Debentureholders calling the meeting, as the case may be, shall in like manner appoint a temporary chairman. A permanent chairman and a permanent secretary of the meeting shall be elected by vote of the holders of a majority in principal amount of the Debentures represented at the meeting and entitled to vote.

Subject to the provisions of Section 10.04, at any meeting each Debentureholder or proxy therefor shall be entitled to one vote for each $1000 principal amount of Debentures; *provided, however,* that no vote shall be cast or counted at any meeting in respect of any Debentures challenged as not outstanding and ruled by the chairman of the meeting to be not outstanding. The chairman of the meeting shall have no right to vote other than by virtue of Debentures held by him or instruments in writing as aforesaid duly designating him as the person to vote on behalf of other Debentureholders. At any meeting of Debentureholders, the presence of persons holding or representing Debentures in an aggregate principal amount sufficient to take action on the business for the transaction of which such meeting was called shall be necessary to constitute a quorum. Any meeting of Debentureholders duly called pursuant to the provisions of Section 11.02 or 11.03 may be adjourned from time to time by vote of the holders of a majority in principal amount of the Debentures represented at the meeting and entitled to vote, whether a quorum shall be present or not, and the meeting may be held as so adjourned without further notice.

SECTION 11.06. The vote upon any resolution submitted to any meeting of Debentureholders shall be by written ballots on which shall be subscribed the signatures of the holders of Debentures or certificates or of their representatives by proxy and the principal amount of the Debentures voted by them. The permanent chairman of the meeting shall appoint two inspectors of votes, who shall count all votes cast at the meeting for or against any resolution and who shall make and file with the secretary of the meeting their verified written reports

in duplicate of all votes cast at the meeting. A record in duplicate of the proceedings of each meeting of Debentureholders shall be prepared by the secretary of the meeting and there shall be attached to said record the original reports of the inspectors of votes on any vote by ballot taken thereat and affidavits by one or more persons having knowledge of the facts setting forth a copy of the notice of the meeting and showing that said notice was mailed as provided in Section 11.02. The record shall be signed and verified by the affidavits of the permanent chairman and secretary of the meeting and one of the duplicates shall be delivered to the Company and the other to the Trustee to be preserved by the Trustee, the latter to have attached thereto the ballots voted at the meeting.

Any record so signed and verified shall be conclusive evidence of the matters therein stated.

SECTION 11.07. Nothing in this Article Eleven contained shall be deemed or construed to authorize or permit, by reason of any call of a meeting of Debentureholders or any rights expressly or impliedly conferred hereunder to make such call, any hindrance or delay in the exercise of any right or rights conferred upon or reserved to the Trustee or to the Debentureholders under any of the provisions of this Indenture or of the Debentures.

ARTICLE TWELVE

SUPPLEMENTAL INDENTURES

SECTION 12.01. In addition to any supplemental indenture that may be entered into pursuant to the provisions of Section 5.06, the Company, when authorized by a resolution of its Board of Directors, and the Trustee may from time to time and at any time enter into an indenture or indentures supplemental hereto (which shall conform to the provisions of the Trust Indenture Act of 1939 as then in effect) for one or more of the following purposes:

(a) to evidence the succession of another corporation to the Company, or successive successions, and the assumption by the successor corporation of the covenants, agreements and obligations of the Company pursuant to Article Thirteen;

(b) to add to the covenants and agreements of the Company in this Indenture contained such further covenants and agreements thereafter to be observed and to surrender any right or power herein reserved to or conferred upon the Company;

(c) to cure any ambiguity or to correct or supplement any defective or inconsistent provision contained in this Indenture or in any supplemental indenture; and

(d) to make such provisions with respect to matters or questions arising under this Indenture as may be necessary or desirable and not inconsistent with this Indenture; *provided, however,* that such actions shall not adversely affect the interests of the holders of any of the Debentures.

The Trustee is hereby authorized to join with the Company in the execution of any supplemental indenture authorized or permitted by the terms of this Indenture, and to make any further appropriate agreements and stipulations which may be therein contained, but the Trustee shall not be obligated to enter into any such supplemental indenture which affects the Trustee's own rights, duties or immunities under this Indenture or otherwise.

Any supplemental indenture authorized by the provisions of this Section may be executed by the Company and the Trustee without the consent of the holders of any of the Debentures at the time outstanding.

SECTION 12.02. With the consent (evidenced as provided in Section 10.01) of the holders (or persons entitled to vote or to give consents respecting the same) of not less than 66⅔% in aggregate principal amount of the Debentures at the time outstanding, the Company, when authorized by a resolution of its Board of Directors, and the Trustee may from time to time and at any time enter into an indenture or

indentures supplemental hereto (which shall conform to the provisions of the Trust Indenture Act of 1939 as then in effect) for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Indenture or of any supplemental indenture or of modifying in any manner the rights and obligations of the holders of the Debentures and of the Company; *provided, however,* that no such supplemental indenture shall (i) extend the fixed maturity of any Debentures, or reduce the principal amount thereof, or reduce the rate or extend the time of payment of interest thereon, or reduce any premium payable upon the redemption thereof, or alter or impair the right to convert the same into shares of Common Stock at the rates and upon the terms provided herein, without the consent of the holder of each Debenture so affected, or (ii) reduce the aforesaid percentage of Debentures, the holders of which are required to consent to any such supplemental indenture, without the consent of the holders of all Debentures then outstanding.

Upon the request of the Company, accompanied by a copy of a resolution of its Board of Directors certified by the Secretary or an Assistant Secretary of the Company authorizing the execution of any such supplemental indenture, and upon the filing with the Trustee of evidence of the consent of Debentureholders as aforesaid, the Trustee shall join with the Company in the execution of such supplemental indenture unless such supplemental indenture affects the Trustee's own rights, duties or immunities under this Indenture or otherwise, in which case the Trustee may, in its discretion, but shall not be obligated to, enter into such supplemental indenture.

It shall not be necessary for the consent of the Debentureholders under this Section to approve the particular form of any proposed supplemental indenture, but it shall be sufficient if such consent shall approve the substance thereof.

Promptly after the execution by the Company and the Trustee of any supplemental indenture pursuant to the provisions of this Section, the Company shall mail, first class postage prepaid, to the holders of Debentures at their last addresses as they shall appear upon the register or registers a notice setting forth in general terms the substance of such supplemental indenture. Any failure of the Company to mail

such notice, or any defect therein, shall not, however, in any way impair or affect the validity of any such supplemental indenture.

SECTION 12.03. Upon the execution of any supplemental indenture pursuant to the provisions of this Article Twelve or of Sections 5.06 and 13.01 this Indenture shall be and be deemed to be modified and amended in accordance therewith and the respective rights, limitation of rights, obligations, duties and immunities under this Indenture of the Trustee, the Company and the holders of Debentures shall thereafter be determined, exercised and enforced hereunder subject in all respects to such modifications and amendments, and all the terms and conditions of any such supplemental indenture shall be and be deemed to be part of the terms and conditions of this Indenture for any and all purposes.

SECTION 12.04. Debentures authenticated and delivered after the execution of any supplemental indenture pursuant to the provisions of this Article Twelve or of Sections 5.06 and 13.01, or after any action taken at a Debentureholders' meeting pursuant to Article Eleven, may bear a notation in form approved by the Trustee as to any matter provided for in such supplemental indenture or as to any action taken at any such meeting; and, in such case, suitable notation may be made upon outstanding Debentures after proper presentation and demand. If the Company or the Trustee shall so determine, new Debentures so modified as to conform, in the opinion of the Trustee and the Board of Directors, to any modification of this Indenture contained in any such supplemental indenture, or to any action taken at any such meeting, may be prepared by the Company, authenticated by the Trustee and delivered in exchange for the Debentures then outstanding, upon demand of, and without cost to, the holders thereof, upon surrender of such Debentures.

SECTION 12.05. The Trustee, subject to the provisions of Section 9.01, may receive an Opinion of Counsel as conclusive evidence that any supplemental indenture executed pursuant to this Article Twelve is authorized or permitted by the terms of this Indenture and that it is not inconsistent therewith.

ARTICLE THIRTEEN

Consolidation, Merger and Sale

Section 13.01. The Company will not consolidate with, merge into or sell or otherwise dispose of all or substantially all the property of the Company as an entirety to, any person unless (a) the successor formed by or resulting from such consolidation or merger or the person to which such sale or other disposition shall have been made shall be a corporation organized under the laws of the United States of America or any State, district or territory thereof, and (b) such successor corporation (other than the Company) shall expressly assume, by indenture supplemental hereto satisfactory in form to the Trustee, executed and delivered to the Trustee by the corporation formed by such consolidation or into which the Company shall have been merged or by the corporation to which such sale or other disposition shall have been made, the due and punctual payment of the principal of and interest (and premium, if any) on the Debentures according to their tenor, and the due and punctual performance and observance of all the terms, covenants and conditions of this Indenture and the Debentures to be performed or observed by the Company. The Company will not so consolidate or merge, or make any such sale or other disposition, or permit any corporation to merge into the Company, unless immediately after such consolidation, merger, sale or other disposition the Company or such successor corporation, as the case may be, shall not be in default in the performance of any of the covenants, agreements or conditions contained in this Indenture or in the Debentures. Subject to the foregoing provisions of this Section, nothing contained in this Indenture or in any of the Debentures shall prevent any consolidation or merger of the Company with or into any other corporation or corporations (whether or not affiliated with the Company), or successive consolidations or mergers to which the Company or its successor or successors shall be a party or parties, or shall prevent any sale or other disposition (or successive sales or disposition) of all or substantially all the property and assets of the Com-

pany (or its successor or successors) as an entirety, to any other corporation (whether or not affiliated with the Company) lawfully entitled to acquire and operate the same. In the event of any such sale or disposition, the predecessor company may be dissolved, wound up and liquidated at any time thereafter.

SECTION 13.02. In case of any such consolidation, merger, sale or other disposition and upon the execution by the successor corporation of an indenture supplemental hereto, as provided in Section 13.01, and upon compliance by such successor corporation with all applicable provisions of Section 5.06, such successor corporation shall succeed to and be substituted for the Company, with the same effect as if it had been named herein as a party; and any order, certificate, statement, request, instructions, advice or resolutions of the Board of Directors or officers of the Company provided for in this Indenture may be made by like officials of such successor corporation.

Nothing contained in this Indenture or in any of the Debentures shall prevent the Company from acquiring by purchase or by merger or consolidation in which the Company is the surviving corporation, or otherwise, all or any part of the property of any other corporation (whether or not affiliated with the Company).

SECTION 13.03. The Trustee, subject to the provisions of Section 9.01, may receive an Opinion of Counsel as conclusive evidence that any such consolidation, merger, sale or other disposition, and any such assumption and supplemental indenture, complies with the provisions of this Article Thirteen.

ARTICLE FOURTEEN

SATISFACTION AND DISCHARGE OF INDENTURE; DEPOSITED MONEYS

SECTION 14.01. If the Company shall deliver to the Trustee for cancelation of all Debentures theretofore authenticated (other than any Debentures which shall have been destroyed, lost or stolen and which shall have been replaced or paid as provided in Section 2.07) and not

theretofore cancelled, or if all the Debentures not theretofore cancelled or delivered to the Trustee for cancelation shall have become due and payable (the date on which such Debentures become due and payable being hereinafter in this Section referred to as the "maturity" of the Debentures), or shall have been called for redemption pursuant to Article Four, or provision satisfactory to the Trustee shall have been made for the giving of notice of redemption as provided in said Article Four, and the Company shall have deposited in trust with the Trustee funds (to be immediately available for payment) sufficient to pay at maturity or upon redemption all of the Debentures (other than any Debentures which shall have been destroyed, lost or stolen and which shall have been replaced or paid as provided in Section 2.07) not theretofore cancelled or delivered to the Trustee for cancelation, including principal (and premium, if any) and interest due or to become due to such date of maturity or redemption date, as the case may be, and if in any such event the Company shall also pay or cause to be paid all other sums payable hereunder by the Company, then

(a) this Indenture shall cease to be of further effect except as to the rights of the Debentureholders to convert Debentures into shares of Common Stock in accordance with the terms of this Indenture and the Debentures, and on or after such date of maturity or redemption date, as the case may be, the Trustee, on demand of the Company accompanied by an Officers' Certificate and an Opinion of Counsel and at the cost and expense of the Company, shall execute proper instruments acknowledging satisfaction of and discharging this Indenture; and

(b) all obligations of the Company in respect of the Debentures shall cease and be discharged (except the obligation to issue shares of Common Stock of the Company upon conversion of the Debentures in accordance with the terms of this Indenture and the Debentures), and the holders of such Debentures shall thereafter be restricted exclusively to such funds for any and all claims of whatsoever nature on their part under this Indenture or with respect to such Debentures (except with respect to the rights of conversion as above stated).

The Company hereby agrees to reimburse the Trustee for any costs or expenses thereafter reasonably and properly incurred by the Trustee in connection with this Indenture or the Debentures, and without bad faith or negligence.

SECTION 14.02. All moneys deposited with the Trustee pursuant to Section 14.01 shall be held in trust and applied by it to the payment, either directly or through any paying agent, including the Company acting as its own paying agent, to the holders of the particular Debentures for the payment or redemption of which such moneys have been deposited with the Trustee, of all sums due and to become due thereon for principal and interest (and premium, if any).

SECTION 14.03. In connection with the satisfaction and discharge of this Indenture all moneys then held by any paying agent under the provisions of this Indenture shall, upon demand of the Company or Trustee, be paid to the Trustee and thereupon such paying agent shall be released from all further liability with respect to such moneys.

SECTION 14.04. Notwithstanding any provisions of this Indenture, any moneys deposited with the Trustee or any paying agent for the payment of principal (and premium, if any) or interest on any Debentures and not applied to such payment within six years after the date of satisfaction and discharge of this Indenture shall be repaid to the Company on its written demand; and thereupon the Trustee or such agent shall be released from all further liability with respect to such moneys, and any holder of such Debentures entitled to receive such payment shall thereafter look only to the Company, as the holder of a general claim, for the payment thereof; *provided, however,* that the Trustee or such agent, before being required to make any such repayment, may at the expense of the Company cause to be published at least once in an Authorized Newspaper a notice that such moneys have not been so applied and that after a date named therein any unclaimed balance of said moneys then remaining will be repaid to the Company.

ARTICLE FIFTEEN

Immunity of Incorporators, Stockholders, Officers and Directors

Section 15.01. No recourse under or upon any obligation, covenant or agreement of this Indenture, or of any Debenture, or for any claim based thereon or otherwise in respect thereof, shall be had against any incorporator, stockholder, officer or director, as such, past, present or future, of the Company or of any predecessor or successor corporation, either directly or through the Company or any such predecessor or successor corporation, whether by virtue of any constitution, statute or rule of law or equity, or by the enforcement of any assessment or penalty or otherwise; and it is expressly understood that this Indenture and the obligations issued hereunder are solely corporate obligations, and that no such personal liability whatever shall attach to, or is or shall be incurred by, any past, present or future incorporator, stockholder, officer or director of the Company, as such, or of any predecessor or successor corporation, or any of them, because of the creation of the indebtedness hereby authorized, or under or by reason of the obligations, covenants and agreements contained in this Indenture or in any of the Debentures or implied therein or inferred therefrom; and any and all such liability is hereby expressly waived and released by every holder of Debentures as a condition of, and as a consideration for, the execution of this Indenture and the issue of such Debentures.

ARTICLE SIXTEEN

Miscellaneous Provisions

Section 16.01. All the covenants, stipulations, promises and agreements in this Indenture contained by or in behalf of the Company shall bind its successors and assigns, whether so expressed or not.

SECTION 16.02. Any act or proceeding by any provision of this Indenture authorized or required to be done or performed by any board, committee or officer of the Company shall and may be done and performed with like force and effect by the like board, committee or officer of any corporation that shall at the time be the lawful successor of the Company.

SECTION 16.03. The Company by instrument in writing executed by authority of a majority of its Board of Directors and delivered to the Trustee may surrender any of the powers or rights reserved to the Company and thereupon such power or right so surrendered shall terminate both as to the Company and as to any successor corporation.

SECTION 16.04. Any notice or demand which by any provision of this Indenture is required or permitted to be given or served by the Trustee or by the holders of Debentures to or on the Company may be given or served by being deposited postage prepaid in a post-office letterbox addressed (until another address is filed in writing by the Company with the Trustee) as follows: Indian Head Inc., 111 West 40th Street, New York, New York 10018. Any notice, election, request or demand by any Debentureholder to or upon the Trustee shall be deemed to have been sufficiently given or made, for all purposes, if given or made at the office of the Trustee at 140 Broadway, New York, New York 10015, where its corporate trust department is located.

SECTION 16.05. In any case where the date of maturity of interest or principal of the Debentures or the date of redemption of any Debenture or the last day upon which any Debenture may be surrendered for conversion shall not be a business day, then payment of interest or principal (and premium, if any) or surrender for conversion, as the case may be, may be made on the next succeeding business day with the same force and effect as if such payment had been made on the nominal date of maturity or redemption or such Debenture had been surrendered on the last day upon which it could have been surrendered for conversion, and no interest shall accrue for the period after such nominal date.

SECTION 16.06. Upon any application or demand by the Company to the Trustee to take any action under any of the provisions of this Indenture, the Company shall furnish to the Trustee an Officers' Certificate stating that all conditions precedent, if any, provided for in this Indenture (including any covenant compliance with which constitutes a condition precedent) relating to the proposed action have been complied with and an Opinion of Counsel stating that in the opinion of such counsel all such conditions precedent have been complied with, except that in the case of any such application or demand as to which the furnishing of such documents is specifically required by any provision of this Indenture relating to such particular application or demand, no additional certificate or opinion need be furnished.

Each certificate or opinion provided for in this Indenture and delivered to the Trustee with respect to compliance with a condition or covenant provided for in this Indenture (including the Officers' Certificate described in Section 6.11) shall include (1) a statement that the person making such certificate or opinion has read such covenant or condition; (2) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based; (3) a statement that, in the opinion of such person, he has made such examination or investigation as is necessary to enable him to express an informed opinion as to whether or not such covenant or condition has been complied with; and (4) a statement as to whether or not, in the opinion of such person, such condition or covenant has been complied with.

Any certificate, statement or opinion of an officer of the Company may be based, in so far as its relates to legal matters, upon a certificate or opinion of or representations by counsel, unless such officer knows that the certificate or opinion or representations with respect to the matters upon which his certificate, statement or opinion may be based as aforesaid are erroneous, or in the exercise of reasonable care should know that the same are erroneous. Any certificate, statement or opinion of counsel may be based, in so far as it relates to factual matters information with respect to which is in the possession of the Company, upon the certificate, statement or opinion of or representations by an officer or officers of the Company, unless such counsel knows that the

certificate, statement or opinion or representations with respect to the matters upon which his certificate, statement or opinion may be based as aforesaid are erroneous or in the exercise of reasonable care should know that the same are erroneous.

Any certificate, statement or opinion of an officer of the Company or of counsel may be based, in so far as it relates to accounting matters, upon a certificate or opinion of or representations by an accountant or firm of accountants in the employ of the Company, unless such officer or counsel, as the case may be, knows that the certificate or opinion or representations with respect to the accounting matters upon which his certificate, statement or opinion may be based as aforesaid are erroneous, or in the exercise of reasonable care should know that the same are erroneous.

SECTION 16.07. If and to the extent that any provision of this Indenture limits, qualifies or conflicts with another provision included in this Indenture which is required to be included in this Indenture by any of Section 310 to 317, inclusive, of the Trust Indenture Act of 1939, such required provision shall control.

SECTION 16.08. In case any one or more of the provisions contained in this Indenture or in the Debentures shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Indenture or of such Debentures, but this Indenture and such Debentures shall be construed as if such invalid or illegal or unenforceable provision had never been contained herein or therein.

SECTION 16.09. This Indenture and each Debenture shall be deemed to be a contract made under the laws of the State of New York, and for all purposes shall be construed in accordance with the laws of said State.

SECTION 16.10. This Indenture may be executed in any number of counterparts, each of which shall be an original; but such counterparts shall together constitute but one and the same instrument.

MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK, as Trustee, hereby accepts the trusts in this Indenture declared and provided, upon the terms and conditions hereinabove set forth.

IN WITNESS WHEREOF, INDIAN HEAD INC. has caused this Indenture to be signed in its corporate name and acknowledged by its President or one of its Vice Presidents, and its corporate seal to be affixed hereunto, duly attested by the signature of its Secretary or an Assistant Secretary; and MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK, as Trustee, has caused this Indenture to be signed and acknowledged by one of its Vice Presidents, and its corporate seal to be affixed hereunto, duly attested by an Assistant Corporate Trust Officer.

INDIAN HEAD INC.

By R. W. LEAR
President.

Attest:

RICHARD J. POWERS
Secretary.

[SEAL]

MARINE MIDLAND GRACE TRUST
COMPANY OF NEW YORK,
as Trustee

By C. E. Hoos
Vice President

Attest:

E. P. DARBY
Assistant Corporate Trust Officer.

[SEAL]

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On the 17th day of April, 1968, before me personally came ROBERT W. LEAR, to me known, who, being by me duly sworn, did depose and say that he resides at 429 Silvermine Road, New Canaan, Conn.; that he is the President of INDIAN HEAD INC., one of the corporations described in and which executed the above instrument; that he knows the corporate seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he did sign his name thereto by like authority.

VINCENT J. ROMANO
Notary Public

[NOTARIAL SEAL]

VINCENT J. ROMANO
Notary Public, State of New York
No. 30-8630120
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1970

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On the 17th day of April, 1968, before me personally came C. E. Hoos, to me known, who, being by me duly sworn, did depose and say that he resides at 188 Greenbrook Road, Green Brook, N. J.; that he is a Vice President of MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK, the Trustee named herein and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such seal; that it was so affixed by authority of the Board of Directors of said corporation; and that he signed his name thereto by like order.

MIRIAM SIEGEL
Notary Public

[NOTARIAL SEAL]

MIRIAM SIEGEL
Notary Public, State of New York
No. 31-3659825
Qualified in New York County
Commission Expires March 30, 1969